

2248

The Practical

REGISTER

223

Or the Accomplish'd

ATTORNEY

Consisting of

RULES, ORDERS,

And the most Principal

OBSERVATIONS

Concerning the Practice of the *Common Law* in his  
MAJESTIES Courts at *Westminster*.

But more particularly applicable to the  
Proceedings in the

**KINGS BENCH,**

As well in matters Criminal as Civil.

---

By WILLIAM STYLE of the Inner-  
Temple, Esq;

---

Alphabetically digested under several Titles.  
With a TABLE directing to the ready finding  
out of those Titles.

---

**The second Edition very much enlarged.**

*Semper ego Auditor tantum, Nunquamne reponam?* Juv. 1. Sat.

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LONDON, Printed for Tho. Dring at the White  
Lion over against the Inner-Temple Gate, and  
John Leigh at the Bell in Fleetstreet. 1670.



Tt  
S 938  
Ed. 2



THE  
P R E F A C E  
TO THE  
READERS,

*To whom it doth or may any ways  
concern.*

**M**Any and frequent have been the clamours of some infatuated Spirits of this distempered Age, who (like the Devil, that arch Enemy to all good Government and Order) labour to bring all things into confusion; yea (if possible) into the Original Chaos, against the Common Laws of this Nation, and the practice thereof. I must confess their pretences, though they are as false as malicious, do yet seem specious and fair in appearance, and are too apt to take with the vulgar and ignorant; and no wonder, for they (*Athenian-like*) pleased with novel-

A 3 ties,

## The Preface

ties, and constant to nothing but inconstancy, are ever thirsting after change and alteration (though to the worse) as children long to vary their Sports, and shift their Toys and Baubles. It is true, that all Creatures (man only excepted) do observe the Rules of Nature, prescribed unto them in a constant and settled way, but he by his fall did lose that perfection, and hath (thereby) not only subjected the Creature, but himself to vanity and vexation of Spirit: this is not only true of man, in his *puris naturalibus*, but even of those whose Souls are heightened above the common pitch, by civil education, and good literature; yea even of Gods dear children who have those extraordinary Characters of his strength and goodness fixed upon them, and see things with a clearer light then meer Nature improved to the utmost can afford: So truly may that Ancient and common saying be applied to all, *mens humana novitatis avida*. That therefore many things are (oftentimes) disliked and inveighed against, even by well-meaning, and (otherwise) discreet men, is no sound conclusion, that they are naught, and fit, either to be abolished or reformed, but that mens minds are unsettled and restless, and not long to be satisfied with any thing, be it (in it self) never so excellent and desirable.

This

*to the Readers.*

This truth is abundantly manifested by *Solomon*, the wisest and greatest of men of his age (if not of any since) in his Book called the Preacher, c. 1. and 2. These things considered (though in my Judgment, who have for this six and thirty years last past and upwards, been a Student of the Common Laws, and for a great part of that time, carefully observed the general practice thereof; yea, I believe also of many more, far more ancient in time, and of far deeper judgments, and more eminent in parts than my self) there is not to be found, either in the Laws themselves, or in the practice thereof, any such considerable inconveniences, or of such dangerous consequence as hath been, and yet is (by some) pretended; I do not think it strange to have heard so loud crys, and calumnies, of late falsely voiced and Printed against them. Endeavours and expedients have been prudently studied, and warily put in practice, by the Grave and Learned Judges and Sages of this Nation, to give satisfaction unto, and to prevent greater mischiefs (if possible) which might arise from the unsetledness of this *Nulli-legian* brood, by ordering and regulating as much as might be (without impairing the excellencies of the Laws themselves, and the due and ready

## *The Preface*

administration of equal Justice) those things against which (they conceived) there was or could be any colour or shadow of exception; but how these men have been satisfied therewith, or whether the people have received (hereby) that general benefit, as was supposed, I leave to the Learned to judge, and to those that have made experience thereof. For my own part, I must confess I cannot yet conceive (always submitting to better Judgments) that our Common Laws, and the practice thereof, which are of so great antiquity, and have been from Age to Age to this present time refining and working into this model, and so happily continued, not only to the good and flourishing of this Nation in our own Country, but to the making of us (thereby) famous and renowned through the whole Christian World, can admit of a sudden alteration for the better, but do rather fear that experience will in time manifest (if it doth not already too much appear) that as great, if not greater inconveniences may fall out to the people by those alterations that have been already made, then there did usually happen before they were undertaken and put in practice: So difficult, nay so dangerous a thing it is on the sudden, and by the ad-

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vice of a few, though Learned and discreet men, to better that which hath been the study, and constant endeavour of many Ages to bring to that excellency, perfection, and beauty, in which the judicious, with joy and content, do behold it to appear. I speak not this to reflect upon the Judgments or actions of those that have assayed any thing in this kind, I know they are placed in many Orbes above me, and may see much further, and will therefore rather conclude myself to be short sighted in apprehending, then say there hath been any mistakes in the not right stating of things; Nor do I hope thereby to stop the clamorous mouths of the malicious and ignorant; for this would be as much folly, as *Surdo canere*, or to present colours to the blind to distinguish of; when their impudence is grown less, and their knowledge greater, it will be then (and not till then) a fit time to bespeak them with reason, till when I leave them. But my desire and intentions herein are in part to settle the wavering minds of such, who though they are not over-swayed with a prejudicate opinion, or so much raised with self-interest, to run clean beside the fair mark of good Laws, Order and Government, may yet be unresolved in their judgments, what  
to



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to determine concerning those Laws and the practice thereof, which have been (of late) without any restraint, so much vilified and despised; And this is also one cause which moved me to give way to the publishing of this ensuing Treatise, that they may thereby receive information, not from me, but from the Oracles of the Law, the Grave and Learned Judges of the *Kings Bench*, and more particularly from the mouth of that upright, stout and polished Pillar of the Law, the late Lord Chief Justice *ROLLE*, what the Law and the practice thereof is and hath been for these latter years, yea even at that very time, wherein they were so much, and so falsely clamoured against; wherein I doubt not but there may be found to be, by those that will and can understand it, so much reason, and such universal and impartial Justice in the Laws themselves, and so much care and circumspection, daily used in the general practice of them, for the equal and speedy distribution thereof, that they shall not need a Champion to stand up in their vindication. As for those miscarriages which do sometimes (and it may be too often) fall out in the retarding of Justice to the prejudice of the Clients, I dare say, that they are usually occasioned, either by their own negli-

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the negligence or wilfulness, and are not to be charged upon others ; and for those that do befall them other ways, either by the ignorance, or falsity of those they intrust, which so long as man is but man, may sometimes be ; you will find that they are no sooner discovered and complained of in the right place, but they are rectified, and (if there be cause) the offences exemplarily punished, and all possible care that may be (from time to time) taken to prevent and meet with the like inconveniences for the future ; so far are and have been the Sages of the Law at all times from countenancing or tolerating any thing, that may stop or obstruct the stream of Justice from flowing readily and indifferently to all. For the Book it self, I cannot call it a perfect Work, you see I aver it to be no more then a few years Collections and Observations thereupon ; and indeed they were only taken for private use, without any thoughts of making them publick, yet such as it is, I conceive it may not altogether prove useless ; for it being the first essay of this nature that I find endeavoured or put forth by any, it may, if it may nothing else, at least encourage others hereafter, to make a further progress in this kind (now that the way is pointed at) then the short space of time, al-

## *The Preface*

allotted me to travel in, hath suffered me to do, and to adde heaps to my gleanings, and to nourish up this my Babe to such a growth and perfection, that it may (happily) when I am gone, forget its first Parent, and own another name and Author, as I have known some Books to have done. It may also be (probably) some direction to those that begin to practise at the Bar, but especially in the Court of the *Kings Bench*; how to practise fairly, and with ingenuity, and to make motions, besitting the honour and wisdom of the Court to grant, and may stand with modesty and discretion, in relation to themselves to move, and not frivolous and useless, yet chargeable to the Clyent; and though it be not worthy to be an Instructor to the long experienced, and ready practicer, to whom I presume few things of this kind can prove new and unheard of; yet may it (perchance) at some time or other, be their remembrancer of those things (though but ordinary) which multiplicity of business will not suffer them on the sudden to call to mind; a thing which I have often observed to befall many able and well versed practicers, and no wonder, for the best memories do often prove treacherous. I have made it my business to observe

*to the Readers.*

observe with diligence, and to render with candor, not mine own, but the sence of the Court in all things, and as near as I could in the very words they were delivered, yet many things being spoken *obiter*, and all men subject to mis-apprehensions, and my self (it may be) as much as others; I will not labour, either to free the book (wholly) from errors, nor my self from mistakes, but leave both to the Readers candid construction and censure. Thou maist perchance think it strange that so ample a subject as the Title of the Book sets forth, should swell it to no bigger a volume; and also ask me why upon many of the heads in the Book, which in themselves do afford such copious matter, I am so brief and concise. For the first know, that my pretensions are not (as thou mayest see in the very Title of the Book, and through the whole Book it self, and which I have also already hinted unto thee) to give thee a compleat Collection of all things, belonging to each head, which I do find and have read, delivered *sparsim* in our Books, but only the substance of such things, which I have heard and taken with my own hand at the Bar for some years last past, much whereof, I am confident, thou canst not find elsewhere in  
Print,

## *The Preface*

Print, and this is also in the second place the true reason why upon some of the heads I am so short, which might have been expected, would have been far larger ; for as things were (occasionally) from time to time delivered by the Court, so were they taken, and so are they offered unto thee, and not otherwise, saving my endeavour to explain some things which by reason of the short delivery of them, seemed more obscure then others, and that not only for the easier understanding of the younger Student, but also (if it were possible) to satisfie those great Antagonists of the Law and the practice thereof (who have need to have things made very plain and easie to them) how much they have been out of the way in their vilifying and labouring to destroy that which is so excellent in it self, and by which (next under God) we are not only continued to be a people, but are also rendered a peaceful and a flourishing Nation, and which I am confident, maugre the malice of those that wish and hope the contrary, will remain and flourish amongst us, until for our sins God shall say (which I hope in his mercy he will not) I have no pleasure in you, but shall suffer a Foreign enemy (as hath been heretofore done) to take away not  
only



to the Readers.

only our Laws and Liberties, but our Land and Nation. If any shall say that my own interest hath warmed my zeal to this temper, and renders what I have said suspicious of belief, I must answer them, that I am indeed of the profession of the Law, and I am not ashamed of it, for I believe it to be not only an honest, but an ingenious and honourable calling, and (in it self) not mercenary, as it is by some said to be, and too corruptly also so made by many others: but for the advantage I have hitherto made by it, or believe I shall ever do, in the way of profit, I might and may yet as easily be contented it should be taken away as most, if not any of them, that cry so loudly against it; only (I believe) with this difference, I desire to keep that little *Quelque chose*, that I have of mine own, *quelquid*. *pur faire bouillir la marmite*, as the French saying hath it, and with which, I am I thank God contented under the protection of the Laws, and they to get what they have not from others, *jure sive injuria*, it matters them not, and that there may be no Law to check or punish their unbridled desires and unlawful actions; did not then the ensuing Treatise abundantly prove the truth of that little I have said in defence of our Laws and the practice thereof, I should not doubt but my single and bare  
aver-



## *The Preface, &c.*

avermment of a truth so well known unto many would sooner be believed, then their many foul calumnies, speaking their own interests, though in disguised and fair words and pretences. I shall say no more, but leave what I have said to thy judicious consideration, and the Book to thy serious perusal and favourable acceptance.

*From my Study in  
the Paper build-  
ings in the In-  
ner-Temple.*

*William Style.*

**THE**

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THE



THE  
Practical Register;  
Or, The  
Accomplish'd Attorney.

---

*Attorney.*

**O**NE appeared as Attorney for the De- 712 28. 67  
fendant without Warrant upon Re-  
cord, and the Defendant said in Court,  
That he made him not his Attorney,  
nor would admit him to be his Attur-  
ney; yet the Court admitted him and  
him put in his Warrant of Attorney, according  
the name mentioned in the Record 28. *Aff. B. Re-*  
*d. 45. 15. H. 7. 14.*

Every Attorney of the Kings Bench, ought to  
end in the Court at the second return of the  
rm, by the Ancient Rules of the Court, for the  
cker dispatch of Justice to be done to the peo-  
s, and for that reason, if they did not, they were  
be put out of the Roll: and it was then Ordered  
the Court, that the ancient Rules of the Court

B

for



## 2      *The Practical Register ; Or,*

for Regulating of the Attornies in their practice should be renewed and set up in the Kings Bench Office, *Hill. 21. Car. Banc. Reg. For the Attornies to take the better notice of them, and that they should not plead ignorance, in case they should transgress those rules.*

An Attorney of either Bench, accepting a Warrant to him directed to appear for the Defendant or subscribing the same, and do not cause an appearance to be entered accordingly, shall the next Term be compelled to enter his appearance of the precedent Term, and plead to Issue; or in Default of Pleading, Judgment to be entered by Default Per Magistrum Livesay, & alios Clericos Pas. 2. Caroli prædicti Regis. 4. T

One may not repeal a Warrant of Attorney given to an Attorney to appear for him, to the intent to defraud the Plaintiff of his appearance, but the Attorney ought by the Rules of the Court to appear for him, according to the Rules of the Court, notwithstanding his Warrant be so repealed, *Trin. 2. Car. B. R.* But after such appearance he may change his Attorney, if he have good cause to do it, and do it without delay of his Proceedings; for the Law requires Speedy Justice to be done to all persons. 4. T

If an Attorney do practice deceitfully, an Attainder lies against him out of this Court, at the prayer of the party grieved, if he make it appear to the Court, and good costs shall be given against him. *22. Car. B. R.* For the Court hath authority to remove all Obstructions that may hinder the equal Proceedings in Law, and to punish the Obstructors, and to right the party injured thereby.

An Attorney and his Clerk were both committed by the Court for entering things against express Rules of the Court, after notice of those Rules given them by the Attorney of the other side, 22. Car. B. r. and worthily; for the doing of this was an apparent contempt of the Court, which the Court is bound to maintain, and they were bound to yield their Obedience.

One Attorney ought not to suffer another Attorney to practise in his name, by reason of the many inconveniencies that often happen to the Clients by his means, 22. Car. B. r.

If an Attorney is put out of the Roll, and another Attorney suffers that Attorney to practise in his name, he shall be put out of the Roll likewise. Per Hyde Ch. Just. Mich. 16. Car. 2. Regis.

One G. H. an Attorney was ordered to be put out of the Roll of Attornies, for entering a judgment against an express Rule in Court, Mich. Car. 22. B. r. at it was not done.

The proper place for an Attorney General to sit upon any special matters, wherein his attendance is required in Court, in matters Criminal, is under the Judges on the left hand of the Clerk of the Crown. At this is but upon special, solemn, and extraordinary occasions; for usually he sits not there, but within the Bar in the face of the Court, Mich. 22. Car. B. r. but he may sit with his Cap on.

Under-Sheriff ought to be Attorney, for it is in the cause of encreasing of Suits, and also a advancement in dispatch of Clients causes, Trin. 23. Car. B. r. By reason of his double Capacity, and Interest, of his great power he may have in the County where he is such an Officer.

#### 4 *The Practical Register ; Or,*

If the Attorney of the Plaintiff or Defendant dye hanging the Suite , and the other party whose Attorney is dead, have notice given of it, and will not retain another Attorney to prosecute for him, the other party may proceed, and is not bound to hinder his Clyents cause for it. *For he is not bound to take notice of the Attorney's death, and is not to be hindered in his proceedings by reason of his Adversaries obstinacy and neglect.* Mich. 23. Car. B. r. 2.

The Plaintiff or Defendant may not change his Attorney pending the Suite, without leave of the Court, Mich. 33. Car. B. r. For the changing of his Attorney, may reflect upon the Credit of his Attorney, relation to his Practice, which the Law is tender of, and it may also prove prejudicial to the other party, by his understanding of this change, Mich. 14. Car. 2.

Also the Attorney ought to be satisfied his Fee before any other shall be admitted to proceed in the Cause, in which another was formerly retained as Attorney.

It was the old course in proceeding in an Action of Trespass and Ejectment, to deliver the Lease of Ejectment to the party to whom the Plaintiff had made a Letter of Attorney to execute the Lease, and for the Attorney to deliver possession of the Land upon the delivery of the Lease, Pasf. 24. Car. reg. But now that way of practice is disused, and the Lessee of the Land sends a Declaration to the Ejector, the Ejector gives notice thereof to the Tenant in Possession to defend the Title ; or if a Declaration is delivered by a stranger to the Tenant in possession, it is sufficient.

If one have a Letter of Attorney to deliver a Deed to another, and also authority from the party

## *the Accomplish'd Atturney.* 5

word of mouth to do it, he may make use of which of these he will to do it by, but not of both; for the first that he makes use of shall be effectual, and the other shall be void, *Pasc. 24. Car. B. r.* For the Law will not warrant unnecessary and superfluous Acts, and when a Deed is once well executed, all subsequent Acts in order to the execution thereof are of no force or validity in Law.

An Infant ought not to appear to an Action by an Atturney, but by his Guardian; for he cannot retain an Atturney, but the Court may assign him a Guardian, *Pasc. 24. Car. B. r.* For the Law doth take Infants and their Estates into protection, and will not suffer them to do any act which may be prejudicial to either; yet on the other side, the Law will not protect them to do wrong: and therefore if there be cause, will assign them Guardians to answer for them, and make satisfaction out of their Estates.

The Attorneys ought to be ordered in the ordinary manner of their practice, by the Master of the Office, and if difference arise between them concerning it, he is to hear both parties, and to order the matters in difference betwixt them, and they are to submit to him, *Pasc. 24. Car. B. r.* and the Court is not to be troubled but in extraordinary and difficult matters of proceeding.

If there be divers Defendants declared against in the Declaration, the Atturney in the cause on the Defendants part, cannot be compelled to appear for more of the Defendants; than for those from whom he had warrant to appear, *24. Car. B. r.* For the Defendants Cases may be different, although the Plaintiff declare against them jointly, and each of them hath liberty to make choice of what Atturney he pleaseth,

## 6 The Practical Register ; Or,

and to Defend himself as he shall be best advised.  
*sed. 1. 5.*

If one retain one by Warrant to be his Attorn in a Suite depending against him in this Court, may appear for him by that Warrant in all Suits which are there depending against him. So that Declarations be filed in the Office, or delivered to the Attorney before the end of the same Term his Bayle is filed. Note this is in case of a Common Bayle but it is otherwise in case of a Special Bayle. *H. 1649. B. Sup. For the Defendant being, after his appearance and bayle put in, supposed to be in Custody of the Marischalli, the Attorney that appears for him is bound to receive any Declaration that is brought against him for one in prison may be charged with any action brought against him by any person.*

Attorneys ought to be of some Inns of Court or Inn of Chancery, and not to lodge in Inns or Ale houses, or in Private places, By Rolfe chief Justice, *H. 1647. B. Sup. 8. Feb. For it is not for the honour of the Law, nor for their credits to lodge in obscure places but to live in Societies, where Order and Government is maintained and were this observed, much foul Practice would be hindered.*

Attorneys of the Kings Bench, ought to be allowed in all Circuits as the Attornies of the Common Pleas are, although it hath been denyed them in the Western Circuit, and ought not to be compelled to pay extraordinary Fees for practising there, per Rolfe *Pase. 1650. 1. Maii. For they are equally Attornies for the good and ease of the people with the Attornies of the Common Pleas, and therefore it is reason they should be equally privileged. vid. 1. H. 7. f. 12. a. that Attorneys of the Kings Bench are not Attornies on Record, Ergo, &c.*



## *the Accomplish'd Attorney.* 7

An Action upon the Case lyes for the Clyent against his Attorney, if he plead a plea for him, for which he hath not his Warrant. *Hill. 49. B. Sup.* And so it is if he appear for him without a Warrant; for he may be damnified by his Appearance, as well as he may by his Pleading for him.

The Attorneys of this Court were ordered from henceforth to be sworn as the Attorneys of the Common Pleas are, by Rolle Pasc. 1650. 1. Maii. B. Sup. This was a good provision for the people, to make the Attorneys the more Conscientious and Careful in their Clyents business.

One cannot force an Attorney to be his Attorney against his will, by Rolle Chief Justice. But whether it be also so in the Common Pleas, and whether in Case all the Attorneys should refuse, whether the Court be bound to assign the party an Attorney. *yea.*

One may be an Attorney for a Clyent upon Record, and yet another Attorney may act all the business for his Clyent. But the Attorney upon Record, is the Attorney that the Law takes notice of.

An Attorney that hath Warrant to appear for his Clyent, may plead for him without another Warrant, by Rolle Chief Justice. Sed 2. for divers Clerks in Court said privately that he cannot plead no other plea for his Clyent without a special Warrant, but a non sum infirmatus. And this seems but reasonable, for were it so that he might plead any other Plea, he might prejudice his Clyent against his will.

In the Case of one Boyle and Scarborough, Pasc. 1656. B. S. Glyn Chief Justice commanded a Rule to be made, and set up in the Office, that none shall entertain an Attorney in a Cause where an Attorney



ney is formerly retained, without first acquainting the Attorney that was first entertained, or the Secondary of the Office, upon pain of 5. l. 4. s. 3. d.

If an Attorney dye pending his Clyents cause, his Warrant of Attorney is determined, and his Clerk may not proceed in the Suite without another Warrant, by Rolfe Chief Justice. For the Attorneys Clerk is not trusted by the Clyent, but the Master, and by his death the trust is determined.

By Glyn Chief Justice, it is against the Rules of the Common Pleas, and against the new Rules of this Court for one to change his Attorney in a Suite. *Pasc. 1656. B. S. 7.*

An Attorney shall not have his Priviledge in an Action brought by himself and his Wife; because as to the wife, the proceedings are *coram non Judice* where *M. 23. Car.* and so is *Powles Case* in *Dyer*.

But where an Attorney brought an Action as Executor, although it was in *Aver droit*, yet held good after a Verdict, *Trin. 1654.*

In the Case of *Ridley and Carr. Pasc. 1656. B. S.* It was said by Glyn Chief Justice, That by the new Rules, if an Attorney of this Court do absent himself from the Court, and not give his attendance for a whole year together, he loses his Priviledge, and was it ruled in this Case.  $\frac{1}{2}$ .

#### ACTIONS.

There ought to be both apparent malice in the Defendant, and prejudice also done to the Plaintiff on regular ground an Action upon the Case upon, or else it will not lye; for if there be only malice and no damage done by it, there can be nothing recovered, and so

the Action will be vain and to no purpose ; and if there be only damage and no malice, it is but *damnum sine injuria*, and not punishable by Law, *Hill. 21. Car. B. r.* For the Law doth not countenance Actions which can give no remedy to the party that brings them, nor will admit men to be vexed by Sutes, where it is apparent they did no injury.

Where there are two several damages done to the party, he ought to have two several Actions, and not to joyn them in one Action. *Entred rot. 156. 20. Car. Hill. 21. Car. B. r.* For this would make confusion in the proceedings, and binder the dispatch of Justice.

Although damage without wrong will not maintain an Action, nor malice without damage, yet if malice may aggravate the damages recoverable, where there is damage and wrong meeting together, *Hill. 21. Car. B. r.* For though the Law is tender in the punishment of those that offend out of infirmity of nature ; yet it looks upon malicious offenders as dangerous and destructive to the Common safety, and doth punish such severely.

Where two Actions, though of several natures depend one upon the other, the abatement of one of the Actions is the abatement of both, *Hill. 21. Car. B. r.* For though the Actions be of several natures, yet having dependency one upon the other, they must be jointly proceeded in ; and so if one fail, the other must needs fail.

In an Action upon the Case, grounded upon a promise ; the Declaration is *Actio super casum* in the singular number, although the Action be brought upon willivers promises, for the word Case includes all, *21. Car. B. r.* because it is *nomen collectivum*, and takes in all particulars belonging to the cause of Action.

## 10      *The Practical Register ; Or,*

An Action brought against a Constable for a thing done by him by vertue of his Office, ought by the Statute to be brought against him in the County where he is Constable, and not elsewhere, 21. Car. B. r. *And that upon great reason, for publick Ministers of Justice are favoured in Law ; and though by Law they are responsible for misdemeanours in their Office, yet the Law provides that they be not put to greater trouble than need requires for their necessary Defence.*

A Transitory Action may be laid in any County at the will of the Plaintiff, yet generally (and it seemeth the better and more indifferent course so to do) it useth to be laid in that County where the cause of Action did first arise, Mich. 22. Car. B. r. *For the Law intends, that there be best Conscience of the Causes of Action may be had, and consequently the clearest Tryal.*

But when there is a tort or cause of Action in two Counties, 'tis at the Plaintiffs Election to lay the Action in which County he pleaseth, *Evone versus Theobald, Mich. 18. Car. 2. Reg.*

Transitory Actions ought not to be brought within Corporations, for their priviledges do properly and only extend for the tryal of such Actions, the causes whereof do arise within their own jurisdictions, Mich. 22. Car. B. r. *And they ought not by colour of their particular Jurisdictions entrench upon the Common Law, but keep themselves within their own bounds.*

Either an Action upon the Case, or an Action of Detinue at the Election of the Plaintiff may be brought for goods detained from him, 22. Car. B. r. *For it is but justice that the party should recover his goods detained in Specie, if they may be had ; or else damages sustained for detaining them at his Election ; for the Defendant is not injured thereby.*

An Action of Trover and Conversion, is in its nature but an Action upon the Case to recover damages, *Mich. 22. Car. B. r. and is not brought to recover the goods in Specie.*

An Action upon the Case, doth lye by the Statute against the Court of Admiralty, for holding Plea of a matter which is not within their Jurisdiction, *Mich. 22. Car. B. r. And justly, for every Jurisdiction ought to be kept within its own bounds, and if any one be injured by transgressing herein the Common Law will relieve the party injured thereby, and cause satisfaction to be made for this injury.*

Where a promise is made by a Fem Covert, or by a Servant, for the Husband or the Master, the Action for breach of this promise ought to be brought against the Husband or the Master; for it is their promise, and the Wife and the Servant are but instruments, *Mich. 22. Car. B. r. and are to receive no advantage or disadvantage thereby, but the Husband and the Master.*

An Action upon the Case doth lye against one for speaking such words falsely and maliciously of another as if they were truly spoken of the party, he might be punished as a Felon, or by some Statute. fined or imprisoned, *Mich. 22. Car. B. r. as for calling him Thief, &c. For although the words be not true, yet the party of whom they are spoken is defamed thereby, and may perchance be prosecuted as a malefactor by reason of the words spoken.*

There is a difference betwixt bringing of an Action, and the laying of an Action, *Mich. 22. Car. B. r.*

It is cause sufficient to ground an Action upon the Case for one to put another to the trouble and charges to sue for that which is his own, *Mich. 22.*

*Car.*

## 12      *The Practical Register; Or,*

*Car. B. r. For there the party is put to unnecessary trouble and charge, and is not damnified thereby; and it is reason he should be repaired.*

The cause for bringing an Action upon the Case for the speaking of words against one, is the temporal loss or damage which may accrew to the party against whom they are spoken, by the speaking of them, and not the words themselves, *Mich. 22. Car. B. r. For the Law regards not words no further than they may tend to the damage of another, either in his person or his estate.*

An Action upon the Case doth lie for speaking of words against a man, by reason of which he lost his marriage, *Mich. 22. Car. B. r. For thereby he may perceive receive damage in respect of the increase of his Estate, and other Comforts of marriage probably expected by the marriage, had it not been hindred by speaking of the words.*

An Action upon the Case doth not lie for arrearages of Rent due upon a Lease for years, because the Law gives a proper Action for it, to wit, an Action of Debt, *Mich. 23. Car. B. r. Yet in some Case one may have an Action upon the Case where he may have another Action, as in the ensuing Case.*

Upon a promise made upon an *insimul computaverunt*, the party to whom the promise is made, may either have an Action of Debt, or an Action upon the Case at his Election, for the thing which was before in dispute and uncertain, is by the account and promise reduced to a certainty, *Mich. 22. Car. B. r. The Action upon the Case lies upon the breach of the promise, and the Action of Debt lies for the sum which is reduced to a certainty, by the stating of the Accompt.*

For



For a Debt certain, referred amongst other things to an Arbitration, an Action of Debt doth not lie, but an Action upon the Case, *Mich. 22. Car. B. r.* For the referring it to Arbitration, amongst other things makes it uncertain; and an Action of Debt lies not for an uncertain sum.

It is not safe to be too particular or over curious in the laying of an Action, for it is often times a cause that the Action doth fail, *Hill. 22. Car. B. r.* For by such Curiosity the Plaintiff gives the Defendant the more advantage in pleading.

An Action upon the Case lies for calling one Whore in London, but this is by the special Custom of the City, *Hill. 22. Car. B. r.* yet 24. *Car. Pasc.* The Court was divided in opinion in this question, whether an Action doth lie or not. *Ideo Q.*

An Action upon the Case lies for a private nuisance, but not for a publick, *Pasc. 23. Car. B. r.* but an Endowment, because the Common-wealth is concerned in which all private Interests are included.

An Action upon the Case doth lie for scandal or for molestation, *Pasc. 23. Car. B. r.* For in both Cases there may be *damnum and injuria*.

Three bring an Action Joyntment for calling of them Coyners, and held that it doth not lie joyntly but severally, *Fishes, 17. Hill. 33. Eliz. in Ban. reg.*

Where a Joynt Action doth lie against divers persons of whom some are known to the Plaintiff, and the rest are not known unto him, the Action may be brought against them that are known by their particular names, and against them that are not known generally, with a *simul cum aliis, &c. Pasc. Car. B. r.* Viz. as to charge them that are known, but not the parties not named.



## 14 *The Practical Register ; Or,*

In a tryal upon a Trespass and Ejectment, or a Replevin touching the Title of the Land in question, although the Verdict pass against the Plaintiff ; yet he may bring a new Action for the same Land for such tryals are not final, *Pasc. 23. Car. B. r.* because the Land is not recovered in them, but the possession only which he had at the time of Ejectment made.

In a Case betwixt one *Nichols* and *Webb* in the Common pleas for calling the Plaintiff (being an Attorney at Law) Knave, a Verdict and Judgment was given for him ; and this judgment being afterward removed by a Writ of Error into this Court ; the Judgment was affirmed, entred, *Trin. 12. Car. Rot. 101. Pasc. 23. Car. B. r.* But the words must be laid to be spoken in relation to his Profession, or else they will not be Actionable.

1 An Action brought for Rent or breach of Covenant upon a Lease, may be laid either in the County where the Lease was made, or in the County where the Lands do lie, that are let by Lease, *Pasc. 23. Car. B. r.* For the Actions found in the realty in respect of the Lands for which the Rent was to be paid, and concerning which the Covenant was made ; and so are not Transitory. *People's case of Affright.*

Vexatious Actions are not favoured in Law, nor by the Court, but may be referred to the Master of the Office to consider of them, *Trin. 23. Car. B. r.* For to favour Vexatious suites, is a great Injustice which the Law that is to do indifferent Justice to all, cannot be guilty of.

A violent intendment may bring one within the compass of an Action, *Mish. 23. Car. B. r.* by Roll *Q. tamen* in what Cases.

One may in some Case bring an Action at the Common Law, for that for which he may also have his remedy in the Ecclesiastical Court, for the Common Law is to be preferred before the Ecclesiastical Law, where they stand in equal degree in respect of the matter to be tryed, *Mich. 23. Car. B. r.* And therefore in such Case it is not reason that the Plaintiff be barr'd from his Election.

By a special custom an Action doth lie in some cases in which at the Common Law no Action doth lie, and so was it adjudged, 8. and 13. *Car. Mich. 23. Car. B. r.* And yet such Action is not against the Common Law; for the special custom of the place, is the Law of that place where it is used.

The Kings Charter cannot enable the Patentee to bring an Action which the Common Law allows not, *Mich. 23. Car. B. r.* For the King cannot alter the Common Laws, or the Proceedings thereby by Charter; for this were to usurp upon the peoples birth-right.

If one bring an Action upon the Case for divers words spoken, whereof some are Actionable and some of them are not, yet the Action lies, *Trin. 24. Car. B. r.* But for them that are Actionable, and as to them only, damages shall be given, if it pass for the Plaintiff.

The Husband may bring an Action alone for scandalous words spoken against him and his Wife, and recover, and yet may afterwards bring another Action to recover damages done to his Wife, by the speaking of the same words, *Trin. 24. Car. B. r.* for the Husband & Wife are both particularly damnified by the speaking of the words. And this shall not be said to be a double vexation.

## 16      *The Practical Register ; Or,*

An Action upon the Case doth not lie upon a contract which sounds in the realty but an Action of Covenant: *Q.* if the contract be mixt with other matters which are not in the realty, whether it will th lie or no? *Mich. 24. Car. Br.*

If one take out a Latitat within the time limited by the Statute for the limitation of Actions ; it is a good bringing of the Action in due time, and he is not barred by the Statute, although he do not declare against the party within the time limited by the Statute, *Mich. 1649. B. S. For the taking out the Writ Latitat, is in the nature of filing an Original, and by doing it, the Suite is commenced within the meaning of the Statute.*

An Action of the Case doth lie against one that doth Arrest another without cause, *Pasc. 1650. 6. M. B. Sup. For there is damnum & injuria to the party arrested by the doing of it.*

One may have an Action upon the Case against a Witness that is served with a *Subpoena* to appear at trial and doth not appear by the Statutes of 5. Eliz. C. 19. 29. *Eliz. C. 5.* by which 10. l. forfeiture is given to the party injured thereby ; and such other satisfaction, as the Court out of which the process issued shall think meet, *Pasc. 1650. B. S. 18. Maii. & Nov.*

A Joint Action of the Case doth not lie against several persons for speaking the same scandalous words, for the words of one are not the words of the other, but they must be severally spoken, and consequently several Actions ought to be brought against them, but a Joynt Endictment doth lie in such a Case, and also a several Endictment at the Election of the Prosecutor 27. *Jan. 1650. B. S.* So ruled by the Court.

One may joyn two Debts due upon two several Obligations in one Action, and so it is of other personal Actions which are of the same nature, but it cannot be done in real Actions, in regard of the different natures of them, and the several kinds of defence may be made in them. 6. Feb. 1650. B.  
*up. quod hanc.*

If a Carriers servant or his son conspire to rob the carrier, and do rob him, the Carrier not being privy to the conspiracy; an Action will lie for the carrier against the Hundred, where he was robbed, upon the Statute of *Winchester*: but this matter may be urged to the Jury upon the tryal in mitigation of damages, by *Rolle Chief Justice*. For it is all one as if a stranger had robbed him, as to the fact done, but as to the damages he is to recover, it is not reason they should be so great, being caused by persons so nearly related to him.

*Amendment.*

By *Glyn Chief Justice*, Pasc. 1657. B.S. After a Plea put in unto a Declaration, the declaration ought not to be Amended by the consent of the Attorneys on both sides, without the leave of the Court, though it be but in things immaterial, and not of substance, yet the Court only is to order and regulate all the proceedings in Law which are there depending. 10.

That the Plaintiff may amend his Declaration in matter of form after a general issue pleaded before entry, without paying costs, or giving Amarlance, but he may amend in substance, then he must pay costs, or give Amarlance at his election, but if he amend after a special Plea

## 18 *The Practical Register ; Or,*

*Plea pleaded, then he must pay, although he would give imparlance, Pasc. 21. Caroli secundi Regis, per Magistrum Livesay, & alios Clericos.*

*Nota :* In all Rules where there is mention made of payment of Costs ; the intent of the Rule is, to pay such costs as the Secondary shall tax.

That the Plaintiff may amend his Bill upon the Plea, at any time before the Plea pleaded, but not afterwards without motion of Court, Pasc. 21. Caroli secundi Regis, per Magistrum Livesay, & alios Clericos, 17

Original Writs are not amendable at the Common Law, for if the Writ be not good, the party may have another, *Hill. 22. Car. B. r. And it is dangerous to alter the foundation of things.*

The leaving out of the Attorneys name in the Imparlance Roll is Amendable upon a motion made to the Court to have leave to do it, but not without leave of the Court ; so that the Attorneys name be not left out in the Issue Roll, for then it is not Amendable, *Hill. 21. Car. B. r. When the Issue Roll is made up, then the Record is a perfect Record, and ought not to be amended in that part, for this would be to alter the Issue.*

If in a Replevin the Avowant do Amend his Avowry before the Term, and do pay costs, the Plaintiff ought to reply the next Term following, but if he pay not costs, he is not bound to reply the next Term, 21. Car. B. r. For by accepting of costs, he has dispensed with the fault in pleading, which was amended



and so he ought not to delay the other party, by taking advantage to delay the party by reason of the amendment.

Any fault in pleading which would be Amendable if the cause were depending in an inferior Court, may be Amended where the cause depends in a superiour Court, but not *è contra*, 21. Car. B. r. For Inferiour Courts are precisely to keep their forms in Pleading; and if they err, this Court will not suffer them in many Cases to Amend their pleadings.

Where two several persons joyn in one Declaration, and one of them die pending the Suite, the Declaration cannot be Amended, but the other party that survives must have a new Writ; for there is a great difference betwixt a Joynt Action and a several, Trin. 22. Car. B. r. For it may be, the cause of Action doth not survive; and so the death of one of the Plaintiffs doth abate the Writ, and where the Writ is abated, the Declaration is not Amendable.

A Plea may be Amended upon giving of notice thereof to the other party, and paying of costs, if the Plea be only entered in Paper, but if it be entered in Parchment, it cannot be Amended, for then it is a Plea upon Record, Mich. 22. Car. B. r. And Records ought not to be amended in material things, such as a Plea is, for this would be to make it another Record.

The Court of the Kings Bench will not Amend a Transcript of a Record removed thither by a Writ of Error out of an inferior Court, but they will Amend a Record removed thither out of the Common Pleas, if they see cause, Mich. 22. Car. B. r. For if they would, this would beget much trouble to this Court, which the dignity of this Court will not suffer.



## 20      *The Practical Register ; Or,*

If the Plaintiff desire to alter his Declaration, it is at the election of the Defendant to take costs of the Plaintiff, and to let him Amend his Declaration, or refuse to take his costs, and to Imparle the next Term, 22. Car. B. r. and 1650. B. S. *For in so doing the Defendant is at no prejudice by the Amendment ; if he will, he may emparle to advise upon a Plea, sitting upon the Declaration so amended, or if there be no cause offered by the Amendment for him to advise, then he may take the costs and plead.*

A Return upon a Habeas Corpus, or upon a certiorari to remove Orders of Sessions of the Peace, cannot be amended the Term after the Return is made, but it may be amended the same Term in which it is made, Hill. 22. Car. B. r. *For the Term after the Return, they shall be intended to be filed, and upon Record ; but the same Term they are returned, usually given by the Court, to amend and make such returns perfect if they be erroneous, and this is in favour of the Common wealth.*

The Clerk of the Peace may amend an Endicement removed into this Court at any time, during the Term in which it came in here, but afterwards it cannot be Amended, Hill. 23. Car. B. r. *for the same reasons as above said.*

The Plaintiff may Amend his Declaration though it be seven years past since he Declared, if it be but in Paper, Hill. 23. Car. B. r. *paying costs, or suffering the Defendant to Emparle till the next Term after ; for the Defendant is no more prejudiced thereby, notwithstanding the antiquitie of the Declaration, than if the Declaration were but of the Term next preceeding.*

If the Plea Roll be rightly entred, though the Plea be mistaken in the transcribing of it, yet the Plea is not b

may be Amended, *Pasc. 24. Car. B. r.* For the Postea made up by the Clerk of the Assizes, and is guarded by the Plea Roll, but the Plea Roll cannot be Amended.

A Declaration grounded upon an Original Writ it be erroneous cannot be Amended, but if it be upon a Latitat or Bill of Middlesex, it may be amended, *Pasc. 24. Car. B. r.* Because the Writ upon which it is grounded, if it be erroneous is not Amendable, and it supposed the Writ was erroneous. But a Declaration in the Kings Bench is not grounded on the Latitat, or Bill of Middlesex, for the Plaintiff is at large to declare as he pleaseth.

If a Transcript of a Record removed out of the Common Pleas Court, be to be Amended here, the Clerk in the Common Pleas is to bring in the Original Record out of Common Pleas into this Court, that the Transcript may be here Amended by the Record it self, *Trin. 24. Car. B. r.* For every Court will only trust their own Officers, with the Records of their Court who are accountable to them for their actions, and are punishable by them for their misemeanours, and with such persons Records are only to be trusted.

The Clerk of the Assizes may Amend the Postea by his Notes, if it be mistaken, after that he hath returned it into this Court, *Trin. 24. Car. B. r.* For such faults shall be said to be but vitium scriptionis, and not the errors of the parties.

An Indictment removed into this Court may be Amended the same Term it came in, but not afterwards but upon some extraordinary matter, *Pasc. 24. Car. B. r.* And to avoid some extraordinary mischief which cannot be otherwise remedied.

After

After the parties have joyned in Demurrer ; the Demurrer may be amended if it be put in Paper, *Paf. 24. Car. B. r.* by the leave of the Court, and the consent of the parties concerned.

A *Postea* may be Amended by the Record in such things whereby the Amendment may not bring the Jury within the compass of an Attaint, *Trin. 24. Car. B. r.* For such Amendment would be mischievous, and the Law takes care to prevent mischiefs.

A Record may be Amended in a small matter after Issue joyned, so that thereby the Plea be not altered. *Trin. 24. Car. B. r.* nor the Record much defaced thereby ; for Records ought to be fair, and plain to be read.

A Record may not be altered by the consent of the Attorneys on both sides, without a Rule of the Court, and if it be, if the party grieved thereby will inform the Court of it, the Court will order to be made the Record as it was before the Amendment, and will punish the Attorneys, *3. Julii 1650. B. r.* For the Judges have the prime Custody of the Records of their Court, and they are to be ordered by their direction as being things of a high nature, in respect both of the Common-wealth, and also of private interest in the parties concerned.

If the Plaintiff Amend his Declaration, though it be by the Rule of the Court, yet the Defendant may plead *de novo* ; else it might be mischievous to him, for the Amendment may make a good Plea bad.

The Imparance Roll cannot be amended by the Plea Roll, but the Plea Roll may be Amended by the Imparance Roll, *Mich. 22. Car. B. r.* For the Imparance Roll is first made, and is the Warrant of the Plea Roll.

The Court Amends *false Latin and form*, in Bills presented unto them by the grand Enquests by their consents, but they may not alter matters of substance in them, *Mich. 22. Car. B.r.* It is sufficient for the grand Enquest to find the matters of substance well, for though they be usually men of good rank and quality, yet it is not intended that they are alwaies good Clerks, or learned in the Law.

The Plaintiff may Amend his Declaration after the Defendant hath pleaded to it, paying costs if it be not entred; but if he do Amend it, the Defendant may also alter his Plea if he will, *Mich. 22. Car. B.r.*

Any Issue entred upon Record, may upon leave by the Court be amended in a small matter, but not in a material thing, or in that which will deface the Record, *Hill. 22. Car. B. r.* For the former would be to make another Record of it, and the latter would be to deface the Record, neither of which the Law allows.

The Statute *de Jeofailes* doth not extend to Letters which are not of Record, *P. 13. Car.*

A thing that is Amendable by Statute, may be Amended in an upper Court, before it be Amended in the inferiour Court, if the matter be apparent and needs no examination, *Hill. 22. Car. B. r.*

A Plea cannot be Amended after the Plea is Demurred unto, nor after Issue joyned, *Mich. 25 Car. B. r.* for that were to go backwards, and to hinder the Plaintiffs proceedings, which the Law will not suffer, yet if the Demurrer be but in paper, though it be two or three Terms after the Plea was Demurred unto, the Demurrer may be Amended, if the party Demurring will pay costs, though the other part have

joynd in Demurrer, 21. Nov. 1650. B. S. For by paying of costs the Plaintiff receives satisfaction for his delay, and dispenseth with the proceedings in Court.

A Return of a Habeas Corpus may be Amended in matter of form only, the same Term the Return was made, but not afterwards, Trin. 1651. B. S. It may not be amended in matter of substance, for this would be to make another return.

It was not the Ancient course of practice to bring the Original Record out of the Common Pleas into this Court to amend the Transcript thereof by, until this Court had agreed it should be Amended. This was observed to avoid needless charge which might otherwise fall out to the Clyent, Pasc. 1651. B. Sup. by bringing the Record hither to no purpose.

If the Common Pleas do Amend a Record thereat which is not Amendable by Law, this Court is not bound to receive the Record so Amended, but will refuse it, Trin. 1652. B. Super. For this is the Custom of the Supreme Court, and will take notice of the Proceedings of other Courts, no further than they agree with the Law.

After the Plea pleaded, and the Jury returned, the Defendant may not alter his Plea without moving the Court. But before the Jury is returned if the Declaration, and the Plea be only in Paper, the party may Amend his Declaration, paying costs, or giving an Imparllance, by Herne Secundarie. Mich. 1651. B. Sup. For the Jury is returned to try that was joynded when they were returned, which they cannot do if it be altered.

Q. Whether a Writ of Error may be Amended which is brought to reverse a Common Recovery.



was so by *Glyn Chief Justice, Hill. 1655.* that it is commendable, because a Writ of Error is in its nature not a *Certiorari* to remove a Record, and doth not give day in Court to the party to appear, *Pasc. 1659.* Record was ordered to be Amended, after a *Deurrer* to that Record was discontinued.

*Attachment.*

If a Rule of Court be made betwixt the Plaintiff and Defendant by their consent; although the Court would not have made this Rule without such consent, yet if either party will not obey this Rule, the Court will grant an Attachment against him that disobeyes it, if the other party desire it: for his disobedience to the Rule, is a trifling with the Court, and a slighting and contempt of their authority, to which by their consent they had formerly submitted. In a Case betwixt *Middleton Plaintiff*, and *Sir John Lenthal Defendant*, upon a Rule made by consent, that *Sir John Lenthal* should seal the Release of Errors upon a Judgment, *Jan. 27. Hill. 1655. B. S.*

An Attachment may be granted against one that stands Indicted of common Barratry, and will not lead to the Indictment, *Trin. 23. Car. B. r. for his contempt to the Court.*

This Court will not grant an Attachment against one for disobeying an Order made by Justices of Assize, *Mich. 23. Car. B. r. For that is no contempt to this Court, but to the Judge that made the Order.*

An Attachment may be granted against the party that



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that doth refuse to joyn in a special Verdict against  
upon, and for refusing to joyn in the payment of  
costs expended upon the tryal, *Mich. 23. Car. B. r.*  
for refusing to bring it into Court, *Hill. 1649. 26. Car. B. r.*  
*Saturday, Pasc. 23. Car. B. r.* For every of these is  
tempt to the Court.

An Attachment is not to be granted against  
Attorney for refusing to obey an order made by  
Judge of this Court in his Chamber, for this is  
contempt to the Court, because such an Order  
not to be accounted for a Rule of Court, *Mich. 23. Car. B. r.* Except it be entred, for then it is a  
of Court, to which the Court expects obedience to  
given.

An Attachment may be granted against Justice  
of the Peace, for proceeding upon an Indictment  
ter a *Certiorari* out of this Court is delivered  
them, to remove the Indictment hither, *Hill. 1649. 26. Car. B. r.* This hath been often done, and justly ;  
the Authority of this Court, is not to be slighted by in-  
rior Authorities.

An Attachment was granted against one of  
parties, to a Suite in this Court, for perswading  
Jurors returned to try the Issue in question, not  
appear at the day upon pretence that he had ob-  
ed an Injunction out of Chancery to stay the pro-  
ceedings in the Suite, *25. Oct. 1650. B. S.* For thereby  
be laboured to obstruct the proceedings of the Court  
subtily and falshood which are odious in Law.

If an Attorney undertake to appear for one, and  
afterwards refuseth to do it, the Court will grant  
Attachment against him for his foul practice, *Pasch. 23. Car. B. r.* in trifling with the Court, and abusing  
the Client.

The Court will not grant an Attachment against  
for disobeying a Rule of the Court, except it be  
proved that personal notice was given to him of the  
Rule, *Trin. 24. Car. B. r. viz. where personal notice is  
is requisite.*

If one Arrest another upon a Latitat, and then  
convey him into a Corporation, and Arrests him a-  
gain there, and proceeds not against him upon the  
Latitat, but in the Corporation, an Attachment lies  
against him for abusing the process of this Court  
and making it a stale to another intent; *27. Nov. 1650.  
Sup.*

This Court will make no Rule for an Officer there-  
to be paid his Fees, before he have dispatched his  
clients business, but if the Client will not pay him  
his Fees after he hath done his business, the Court  
will grant an Attachment against him, by Rolle  
Chief Justice. For although the Officer may have an  
Action to recover his Fees, yet this is not satisfaction  
for disobeying the Orders of the Court, which is, for eve-  
ry Client to pay the known Fees, which are not due till the  
clients business is dispatched.

An Attachment lies against the parties that will  
not pay such costs as are taxed by the Master of the  
office of this Court, *21. Car. B. r.* For is it the taxing of  
the Court, though done by the Officer, and the refusal to  
pay them, is a Contempt to the Court, and not the Of-  
ficer.

An Attachment was granted against one for pro-  
ceeding in an inferior Court, notwithstanding that a  
Habeas Corpus Issued out of this Court, and there-  
upon a Superfedeas also granted to stay the proceed-  
ings there, and an Amercement set upon the party  
that was to return the Habeas Corpus for not making

a re-

a return of it, 21. Car. B. r. For where the Authority of this Court doth interpose, there all inferiour Authorities are to cease to act, and to be assistant to this Court in what they are required in the prosecution of the Cause here.

In some cases the Court doth not use to grant an Attatchment against persons for misdemeanors done against the Court, but will send a Tipstaff of the Court to bring in the offender, viz. if the party live in or near the Town. 21. Car. B. r. For this is the readier way to bring in the party.

An Attatchment was granted against a Sheriff for refusing to bring moneys into the Court which he had levied upon an Execution, and was ordered by the Court to bring it in. Mich. 22. Car. B. r. For the Sheriff is an Officer of this Court.

Generally an Attatchment doth lie for any contempt done against the Court, Hill. 22. Car. B. r. For the Court will uphold its Authority.

An Attatchment was granted against one for taking out of an Execution without any Judgment or warrant it, Hill. 22. Car. B. r. This was found to be a disobedience, and an usurpation upon the Authority of the Court.

An Attatchment doth lie by the Rules of the Court, upon motion, for not making a return of a Habeas Corpus upon a Pluries Habeas Corpus issued forth, Hill. 22. Car. B. r. For this appears to be a high contempt in refusing so often to obey the Process of this Court.

An Attatchment was granted against one for Arresting one three several times upon Latitats taken out of this Court, for one and the same cause, and for proceeding against the party Arrested upon any other

*ern, Hill. 22. Car. B. r. For this was to use the Authority of this Court meerly for Vexation.*

An Attatchment was granted against two Bailiffs for Arresting the Tenants of one *Glover*, upon a writ out of this Court upon the Lords day, when they might have done it as easily upon any other day of the week, *23. Car. B. r. The Common Law is tender of the keeping of the Lords day.*

An Attatchment was granted against a Bailiff for executing of a Proceſs of this Court against the Rule of the Court, *Pasc. 23. Car. B. r. having notice of the Rule. For this appeared a wilful contempt.*

If one be endicted for Perjury, and the Witnesses prove the Perjury be served with Proceſs to appear at the tryal and will not appear, whereof the tryal goes for the Defendant, the Court will grant a new tryal, and an Attatchment against the Witnesses, in the Case of *Howel Gwin, Hill. 1655. B. S.*

An Attatchment cannot be granted against the Marshal of the Kings Bench; for this would be to let all the Prisoners escape, but a fine may be set upon him by the Court for misdemeanours in his Office, *Hill. 1655. in a cause against Culpeper, a prisoner with Mr. J. Lenthall. Sep. 7. 66.*

*Amercement.*

The Clerk of the Peace is Amerceable by the Court of the Kings Bench, for gross faults in Indictments drawn up by him and removed thither, and it hath often been so done. *21. Car. B. r. For such faults*  
*sett*

*shall be intended to be faults committed out of negligence and not out of ignorance.*

If upon a *Latitat* taken out of this Court, the Sheriff doth return a *Cepi Corpus*, and the party arrested upon this Process, doth not appear at the day of the Return, the Sheriff may be Amerced by the Court, yet if the Sheriff be Amerced, if the party Arrested do appear within a week after the day he ought to have appeared, the Amercement may by the course of the Court be taken off of the Sheriff, *22. Car. B. r. For a weeks time is but a small matter, the party cannot be prejudiced by this small delay, & minimis non curat Lex.*

The Sheriff is to be Amerced for the faults of his special Bailiffs, for the Sheriff is the Officer to the Court, and not they, *Hill. 22. Car. B. r. But 2. whether he shall be Amerced for the faults of the common Bailiffs, it seems he shall, for they are his servants, & he takes security of them to keep him harmless.*

If the Sheriff be Amerced by the Court for the doing a thing belonging to his Office, and yet he continues to neglect to do it contrary to the Rule of this Court, the Court may increase the Amercement upon him, until he perform his duty therein, *Trin. 23. Car. B. r. For the greater the offence is, the greater the punishment ought to be.*

Amercements set upon the Sheriff, upon the motion of the party, if they be not estreated into the Exchequer, may be with a *respectuatur*, that is be respected, if the party grieved who caused him to be Amerced will consent thereunto, otherwise it cannot. *Trin. 23. Car. B. r. For though the Amercements are due to the King, yet they were set upon the Sheriff for injury done to the party.*

The Sheriff of York was Amerced in this Court, not returning a Writ of *Habeas Corpus cum causa*, though he was commanded not to do it, by the Bishop then President there, 14. Ed. 3. *Gromps. risd. f. 78.*

A Sheriff out of his Office cannot be Amerced by Court, for then he is not an Officer to the Court. A *Distringas nuper Vice-comiti* may issue out against him, Mich. 23. Car. B. r. to *distrain him, and ke him come in, for he is not now accounted present in Court, as when he was Sheriff.*

An Amercement which is grounded upon a Presentment, which Presentment is only voidable, by reason of some fault in it, is a good Amercement, but if be grounded upon a Presentment which is absolutely void, the Amercement is also void, Mich. 24. Car. B. r. For there is difference between a thing that is void, and a thing voidable, that which is but voidable, is good in Law, till it be legally made void, but a thing void, is void ab initio.

### *Assignment.*

The Assigning of a general Error upon a Writ of Error, brought to reverse a judgment, is to say that Declaration is insufficient, that the judgment is given for the Plaintiff, whereas it should have been given for the Defendant, &c. and it is not shewed for what reason it is so, 21. Car. B. r. *nor any particular Error assigned.*

If one bring an Action of Debt upon an Obligation that was given for performance of Covenants upon supposition of breach of the Covenants, he must assign but one breach of Covenant in that Action.

*Trin.*



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*Trin. 22. Car. B. r. otherwise the Defendant  
not justifie or take Issue. And the assignmen  
one breach, if proved, is enough to maintain  
Action.*

A Statute Merchant or Staple cannot be assign  
over to another. *Mich. 22. Car. B. r. Q.*

If Lessee for years Assign all his Term to come  
his Lease over unto another, he cannot reserve a re  
for if he do, such reservation is not good, because  
Lessee hath no Interest in the thing, by reason  
which the Rent reserved should be paid: *Pasc. 24. C.  
B. r. 21. Ap. 1648. In the Case of one Leach, and D  
upon a tryal at the Bar. Q. James to Safety. 178. v. l.*

### Averment.

Where a Statute is recited, there one may not  
ver that there is no such Record, for generally an  
verment as this is, doth not lie against a Record.  
a Record is a thing of a solemn and high nature,  
an Averment is but the Allegation of the party,  
*Car. B. r. and not so much credit in Law to be given  
to it.*

One may not Aver a thing contrary to the Con  
tion of an Obligation, no more than he may aga  
a Record, for the Condition is part of the Deed wh  
shall be supposed to be made upon good deliberati  
and before Witnesses, and not be contradicted by  
a bare Averment. *7. No. 1650. B. S.*

It was said by the Court, that if one assume up  
himself to do a future act, and an Issue is joyned up  
this promise, whether he hath done this thing or  
the party needeth not to Aver that he hath done  
for the doing or not doing of it is Traversable,

the Plaintiff might have taken advantage upon the Defendants Plea if it was not true. *And therefore such averment is needless.*

*Avowry.*

If one make an Avowry for two causes, and can maintain his Avowry, but for one of them, yet it is a good Avowry, 21. Car. B.r. For thereby it appears he has a good cause to distrain.

One Avowry may be made upon two several parcels of land, though the Avowry is but for one Rent. 6. 1650. For one Rent may depend upon several parcels.

*Adjournment.*

The Court is Adjourned by the Cryer of the Court when he hath made Oyes three times, and the substance of the Adjournment is to give licence to all parties that have any thing to do in the Court to forgo their attendance, and to take their ease till such time precisely named, and then to attend in Court again. The meaning of the word to Adjourn is to remove of any thing to another day, and in the sense it is to put off the business of the Court till the day that is precisely set, that none should be bound to needless Attendance in the mean time.

Every last day of the Term and every Eve of a day which is not *dies juridicus*, or a Law day, whereof there is two such days in Mich. Term, viz. all Saints & Souls day, and one a piece in Hillary Term, Easter

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Term and Trinity Term, viz. the day of the purification of our Lady in *Hillary* Term, Ascension day in *Easter* Term, and Saint *John* the Baptists day in Trinity Term, the Court is Adjourned, and it used to be done in *French* two several times, sitting the Court towards the latter end of the day, a good space of time being between the first and second pronouncing of the Adjournment.

A Jury which doth not appear full, cannot be Adjourned, for such a Jury is not accompted a Jury, *22. Car. B. r.* and so are not bound to attend the Court, if it would be to no purpose.

The first Adjournment of the Court is about eleven of the Clock, and the last immediately before the closing of the Court. That all parties that have business at the Court, may the better take notice of it, who may be there at the last Adjournment, though not present at the first, & *c* contra.

### Administration.

The Mother ought to have the Administration of the Goods and Chattels of her Child before a son, a brother or a sister. *22. Car. B. r. Trin.* For there is a nearer bond of nature between the Child and Parents, than betwixt the child and any other lateral tie of blood or kindred: and the child can never sufficiently satisfy the Obligation he hath to his Parents for his being and education especially to his Mother.

But if the daughter marries, her Husband shall take Administration of her goods and not her Mother, *Franklin versus Fruey, Hill. 21. Car. 2. R. in B. r.*

Whe

Where the payment of money would not be for the advantage of the Testator, there the not paying it cannot be pleaded to be to the retarding of the Administration of his Goods and Chattels; *Mich. 22. Car. B. r. For the estate of the Testator is not concerned by the payment or not payment.*

All Actions which an Administrator can have, is given unto him by several Statutes, *Mich. 22. Car. r. For the Common Law took no notice of an Administrator; but it did of an Executor de son tort et mesne.*

Where an Administration is granted by such a jurisdiction as the Law takes notice of, it is not necessary to shew that the Letters of Administration were granted by the Ordinary of such a place, but where the Law takes no notice of the jurisdiction of that Court where the Administration was granted, the Letters of Administration must be so pleaded, viz. *loci illius Ordinarium, Mich. 22. Car. B. r. For where the Law takes notice of a particular jurisdiction, it doth take notice of the Acts done by vertue thereof; but where it doth not take notice of a jurisdiction, there it takes no further notice of the acts done by vertue thereof; and it is made appear by the party that claims any privilege in Law by them.*

Letters of Administration may be revoked by a revocation without a seal, *Mich. 22. Car. B. r. For Letters may be granted by the Act of the Court as they call without a seal. This I have heard Doctors of the Law affirm.*

The Ordinary ought not to repeal Letters of Administration which he hath duly granted, but if they be unduly granted, viz. to such a person, who by Law ought not to have them, he may revoke them.

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*Pasc. 23. Car. B. r.* For if he might do it in the former case, this would be to make his power arbitrary which Law abhors, but the latter is but to reform an error which all Laws do allow.

One of the half blood is in as equal a Degree kindred to the Intestate to have Letters of Administration granted unto him as one of the whole blood is, *Mich. 23. Car. B. r.* Though not as to inherit Lands.

An *Indebitatus assumpsit* doth not lie generally against an Administrator, *Hill. 23. Car. B. r.* if it be shewn in the Declaration for what the Testator was indebted, it well lies.

Letters of Administration granted per *Car. Regem debito modo* adjudged to be well granted in that form. *Hill. 24. Car. B. r.* This was when the ecclesiastical Jurisdiction was taken away.

Where the parties that require Letters of Administration from the Ordinary, are of equal degree kindred to the Intestate, there it is in the discretion of the Ordinary to grant them to which of them pleaseth. *Pasc. & Mich. 24. Car. B. r.* For by so doing doth neither of the parties wrong; *sed Q. whether he will not grant them to both.*

Where one bequeaths a Legacy to one of his children, and the residue of his goods to another, Administration ought to be granted to him to whom the residue of the goods are bequeathed, *Mich. 24. Car. B. r.* For it appears by the bequest of the Legacy to the party that he intended only to make him a Legatee, and not Executor of his goods and Chattels.

*Arrest.*

If an Action of Debt be entred in any of the Courts

ounters in *London*, a Serjeant may Arrest the party without the Sheriffs Warrant. *Trin. 22. Car. B. r.* For entry of the *Action* there is a *Warrant* in *Law* for Arrest, and the Serjeants are attendants at the Counters, and may take notice of such Entries; and it is that which impowers the Sheriff to make his *Warrant*.

By *Glyn chief Justice*, *Mich. 1658.* If one be Arrested within a *Liberty* without a *non omittas*, yet the arrest is good; for no inferior Court can try the priviledges of this Court.

A Clerk of the Court ought not to be Arrested for any thing which is not criminal, because he is supposed to be alwaies present in Court, and must answer the Plaintiff there; and therefore he that doth arrest him is punishable by the Court. *Trin. 23. Car. r.* and therefore such an Arrest is accounted to be vexatious, which the *Law* warrants not.

One ought not to be Arrested upon every slight suspicion of *Felony*, but there ought to be a good ground shewed for the suspicion before he is to be arrested; for *Fame*, *Life*, and *Liberty* are precious things in the eye of the *Law*. *Mich. 1649. B. S.* And to be preserved as much as may be with justice.

One that is not priviledged from Arrest, by reason of his attendance upon his business in some Court of Justice, or some other waies priviledged by some special Rule or Order of Court, may be Arrested in *Westminster-Hall*, the Courts sitting there. *Mich. 1649. B.* And it hath been often done, for it is not the place, but their business and employments that protects the parties.

2. If the practice is not altered since (*Cur. Christian.*) came up.



*Appearance.*

In all Transitory Actions, the Plaintiff after the next day of the subsequent Term after the appearance shall not alter his own Verdict though he would pay costs, or give Imprisonment, Pasc. 21. C. secundi Regis, per Magistrum Livesay, & alios Clericos.

If an Infant be sued, he cannot appear, or plead by Guardian without admittance, but if he do so is only a misdemeanour in the Attorney, for though the Court may punish him if they please, but not more, Pasc. 21. Caroli secundi Regis, per Magistrum Livesay, & alios Clericos.

If one do give an Attorney Warrant to appear for him, and shall afterwards repeal this Warrant with purpose to delay his Appearance, the Court will notwithstanding the repealing of his Warrant, compel his Attorney to appear for him in such a manner as by the Rules of the Court he ought to have appeared, if his Warrant had not been repealed, Trin. 22. C. B. r. For the Law favours not delay, but will have speedy justice to be done.

In all Cases where Process may Issue forth to take the persons body, there every such person may appear in Court in his proper person. Hill. 22. Car. B. r. For such process, is but to bring in the party to answer, and he may do it in person if he please.

Though one do appear in Court upon the Return of a Writ Issued forth against him, yet he doth not admit the Writ to be good by such his Appearance, for he cannot have Over of the Writ, until the party

hath declared against him, *Hill. 22. Car. B. r.* For he is Arrested upon a Warrant made by the Sheriff upon receipt of the Writ, and doth not see the Writ. And the Law will not presume any person to admit a thing which he knows not what it is, and may be prejudicial to him to admit it.

The Principal cannot give a Warrant of Attorney to an Attorney to appear for his Surety, *Pasc. 23. Car. B. r.* By the Rules of this Court, but it was usually done heretofore in the Common Pleas, but now by the late Rules the practice there I suppose is agreeable to the practice of this Court.

If an Attorney do promise to appear for his Clyent, and yet afterwards refuseth to appear according to his promise, the Court will compel him to appear for him, although he say he had no Warrant to appear. *Hill. 22. Car. B. r.* And if he will not appear upon the Rule of the Court, an Attatchment lies against him for his contempt to the Court, *Pasc. 23. Car. B. r. & Mich. 24. Car. B. r.* And false practice, yet if in truth he had no Warrant, and do appear, his Clyent if he be prejudiced thereby, may have an Action upon the Case against him; therefore let Attorneys be circumspect what they do.

If there be divers Defendants put in one Declaration, an Attorney is not bound by the Rules of the Court to appear for more of them, than such as from whom he hath Warrant to appear, *Pasc. 24. Car. B. r.* For their cases may be different, though the Declaration be joyned, and every one may chuse his own Attorney.

If the Defendants Attorney do receive a Declaration against his Clyent from the Plaintiffs Attorney, this is an Appearance for him. *II. Nov. 1650.*

B. S. 24. Maii Pasc. 1650. B. S. For thereby he adm  
his Clyent to be in Court, and takes upon him the defe  
of his cause.

In the Court of Common Pleas, upon a *Capias* iss  
forth in an *ejectione firme*, the Defendant is by  
Rules of that Court to appear and plead in one  
the same Term, but it is not so in the Kings Ben  
for there he hath liberty to imparle to the  
Term. Trin. 24. Car. B. r. It seems to be more rea  
able that he have liberty to imparle, that he advise  
what to plead, than to be forced to plead in so shor  
time.

An Infant ought to appear by his Guardian, a  
not by his Attorney, for he cannot make an Attur  
but the Court may assign him a Guardian with  
consent. Pasc. 24. Car. B. r. Trin. 1650. So that  
appearance by an Attorney is no appearance in Law,  
cause it is by one that hath no lawfull authority  
appear, and the Law approves only of things lawfu  
done.

The like was held by Glyn Chief Justice, Ma  
1656. B. S.

If one appear in this Court, but doth not put  
Bail, this is accounted to be no Appearance, for it  
the putting in of Bail that Attatcheth the Cause  
Court; yet in the Common Pleas, it is held a good  
Appearance before Bail be put in. 7. Maii. 1650.  
Sup. Q. to what intent it is so held.

If an Attorney promise to appear for his Cl  
ent, the Court will compel him to put in Ba  
for him. For the promise to appear implies the  
ther.

If one appear by a name which is not in truth  
right name, and thereupon the Plaintiff declares  
gain

admitt him by that name, he shall be estopped afterwards to say that he is not right named. 20. B. 1650. B. S. For he shall not be suffered to take advantage of his own wrong to prejudice another there- by.

ne If the Attorney do appear for his Clyent but de Benesse, that is, if his Clyent shall like and approve it, he may send back the Declaration delivered upon his appearance, and is not bound to plead to it. 14. Nov. 1650. B. S. For this was not an absolute appearance, but a conditional.

n, Two Nichils returned upon a Scire facias, and an as scire facias do mount to an appearance upon which the party may proceed, 19. Ap. 1650. Sup. For it shall be accounted a sufficient notice to appear, and the Plaintiff must not be delayed beyond law, son.

Affidavit.

Ma An Affidavit made before a Master of the Chancery is of no force, nor ought to be read in this Court; nor will the Court make any Rule upon such Affidavit. Trin. 22. Car. B. r. & Pasc. 24. Car. B. r. it is made Coram non Judice, as to this Court. yet may of an Affidavit.

50. An Affidavit ought only to set forth the matter which the party intends to prove by his Affidavit, and not to declare the merits of the Cause. B. Car. B. r. For the Court is to Judge of the merits of the cause, and not the party to swear.

th The Plaintiff or the Defendant may make an Affidavit in the cause depending, and it may be filed here. gain

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but it cannot be admitted in evidence at the tryal of the cause. *yet may of an Affirmation.*

An Affidavit touching the tryal of the cause ought to be made before one of the Judges of the Court, in which the cause is depending. *Mich. Car. B. r. For the Court may make extraordinary in extraordinary Cases for the Speedier proceeding them.*

An Affidavit made against a Verdict is not admitted, *Pasc. 23. Car. B. S. For the oaths of 12 are of far more credit, than of one.*

When an Affidavit hath been read in Court, it ought to be filed, that the other party may see, and take a Copy of it, if he please, By *Rolle Chief Justice. Pasc. 1655. to make what use of it he can for his advantage.*

### Addition.

One may have one Addition at one day, and in one place, and yet may have another different Addition at another day, and in another place. *Mich. 22. B. r. For some Addition, viz. of Esquire, Gentleman, Yeoman, &c. are no part of the name, but Addition ad libitum, and as people please to call them. But the Title of Knight, or Baronet, is part of the party's name, and it is material, to be rightly used in pleading, but the titles of Gentleman, or Yeoman, are conditions ad placitum to be used or not used, Mich. Car. B. r. Or to be varied.*

But the Title of an Earle of Ireland, is not an Addition ad placitum, *Mich. 1649. B. S. Because an Addition given by Patent, which the Law requires notice of.*

*Award.*

An Award that is made, that one of the parties, who submitted themselves to the Award, shall pay money in the house of a stranger, is not good, for this is to Award him, to do a thing which will make him a Trespasser, and so liable to an Action, which is unreasonable: But between *Taverner* and *Skingle* *Cro. Car.* 1266. it was held otherwise there after a long debate; the strangers house there, being a Common Inn. *Mich. 22. Car. B. r.* But if the Award be to pay the money in the house of one of the parties that submitted to the Award, such an Award is good, for it implies a licence from the party, for him to pay it there. 10. *Feb.* 1650. & *volenti non fit injuria.*

An Award to pay money at the house of a stranger, may be a good Award: for he may come to the house in many cases) and be no Trespasser: but if he cannot come to the strangers house, without being a trespasser to him, there such Award is not good, as I conceive. *Mich. 22. Car. B. r.*

A conditional Award is not good, because it is not final to determine the matters in difference, submitted to the Arbitration, as Awards ought to be, *Mich. 22. Car. B. r.* For if they be not final, they are to no purpose; for they beget trouble in stead of making peace.

If all the matters submitted to the Arbitrators, be not Awarded upon, the Award is not good, *Pasc. 23. Car. B. r.* Because such an Award is not final to end all differences submitted.



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An uncertain and doubtful award is not good, because it makes not an end of all the matters submitted unto by both parties, but leaves them at large to sue and trouble each other, as they were before the award made. *Trin. 23. Car. B. r. For one party may construe the award one way, and the other another way.*

An Award may be void in some part, and good in another part, viz. if the award do make an end of all the differences submitted unto the Arbitrators, by the parties, *Trin. 23. Car. B. r. Mich. 24. C. B. r.*

If each party submitting to the Award, hath power by the Award to compel the other party, either by Law or equity to perform the Award; the Award is good although the party be thereby put to his Action. *Mich. 24. Car. B. r. Else it is not good, for that is not binding in the Law to the performance whereof the Law cannot compel the party bound.*

An Award that a thing shall be done to a stranger is a good Award, if it appear that the parties who submitted to the Award, have benefit by the doing of it. *Pasc. 1650 B. S. 4. Junii. For every Award is intended in Law to be made for the equal benefit of the parties that submitted unto it.*

If an Award be good in any part of it, to all the parties that did submit to it, if the Award be broken in that part, an Action will lie for that breach, *Pasc. 1650. B. S. 4. Miii. For as to so much it shall be accounted a good Award, and is to be performed, and therefore the Award, though imperfect, shall not vitiate that which is good. quod est.*

An Arbitrator cannot delegate, or transfer the power given him by the parties that submitted to Arbitration, for it is contrary to the submission.

an Arbitrator may refer a Ministerial act, touching the Arbitration to another. *Trin. 1650. B. S. Junii.* For such act shall be accounted to be done by the Arbitrator himself, and the other that did the thing shall be accounted but his servant.

The Court will not suppose any thing to be Awarded in an Award, which is not submitted unto, except the contrary be made to appear. *10. Feb. 1650. S.* For this were to suppose the Arbitrators to do justice by exceeding their Authority which the parity of the Law will presume no man will

*Affirmance.*

It is not proper to move to have a Judgment affirmed after a Writ of Error brought to reverse it, before the Errors be assigned, but one may move for Execution upon the Judgment. *22. Car. B. r.* For before the errors be assigned the Court will intend the judgment to stand good notwithstanding the bringing of the Writ of Error. For a Writ of Error is many times brought meerly to delay the Execution, and without any just cause, and therefore it is not improper to move for execution, notwithstanding a Writ of Error be brought, if the Errors be not assigned in due time after the Writ brought.

*Agreement.*

A forced Agreement of the party, is accounted to be no Agreement, and therefore the Court will not compel him that did thus agree to a thing, to perform his agreement. *22. Car. B. r.* For the Law abhors all force and violence.

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An Agreement which is made between the parties only by Paroll, may be discharged and made v at any time before it is broken by Parol without tisfaction ; for *eodem modo quo oritur, eodem modo di vetur*, but after it is broken, it cannot be discharged without satisfaction of it. 22. Car. B. r. For by the bre there is a wrong done to the party, which the words e not release without satisfaction, but before the breach injury was done to any party, nor any of them injured such a discharge.

If an Agreement made by Parol to do any thing be afterwards reduced into writing, the Parol agreement is thereby discharged ; and if an Action be brought for the non performance of this agreement, it must be brought upon the agreement reduced into writing, and not upon the Parol agreement. Pasf. 23. Car. B. r. For both cannot stand together ; because it appears to be but one Agreement, and that shall be taken which is the latter and reduced to the greater certainty by writing for, Vox emissa volat, sed Litera scripta manet.

The Plaintiff and Defendant, may (by agreement between them) give money to the Jury before they pass upon the tryal to defray their charge where the tryal is put off, and thereby they are forced to stay longer in Town than they expected Mich. 1649. B. S. For by doing of this the Jury cannot intended to be made more favourable to one party than the other.

By Rolle Chief Justice : If the Plaintiffs Attorneys and the Defendants Attorneys, do agree to things in order to the proceedings in their Clyents cause though the Clyents do afterwards refuse to consent

their agreement, yet the Court will compel the attorneys to perform the agreement. For as they are attorneys, the Law doth allow them to make such agreements, and if the Client should avoid them afterward, it would be mischievous in delay of Justice.

*Attornment.*

An Attornment made unto *Cestuy que use*, is a good attornment in Law to the Feoffee of the Land, if the Tenant of the Land have notice of the use, when he Attorns Tenant to *Cestuy que use*. Mich. 22. Car. 1. For then he is not ignorant in whom the use in Law is, and to whom he makes the Attornment. *Attorn. R. 295.*

An Attornment made after Sun-set, is not a good attornment, for an Attornment is a solemn act, and ought to be done so that notice may be taken of it, which shall not be presumed to be in the night. Mich. Car. B. r. For that is time for rest, and not for business.

*Assumpsit or Promise.*

A promise that is made upon a sufficient consideration, is, as if it were made upon a precedent consideration, Mich. 22. Car. B. r. For the consideration shall be intended to be the cause why the promise was made, the cause of which is alwaies presumed to be before the promise.

An Assumpsit or promise to do a thing upon consideration, that he to whom he made the promise, shall surrender an Indenture to him, is a good consideration to ground an Action upon for breach of this

this promise, although he to whom the Indenture  
surrendered do take no estate by this surrender, *M. A.*  
23. *Car. B. r.* For though he take no estate by the In-  
denture, yet he may perchance have some tollerable  
benefit, by reason of the surrender, and he that  
surrendered it may be prejudiced by the surrender;  
therefore it is reason that the party should be repaid  
by the performance of the promise made before the  
surrender.

If one upon a good consideration do assume  
a promise to do a thing, he that promised to do it,  
shall have a reasonable time allowed to him for the doing  
of it, and shall not have liberty to do it at any time  
during his life. *Hill. 22. Car. B. r.* For the party  
promising, receiving a present benefit by the consideration,  
it is not reason the other party should expect so long for  
the benefit he is to receive by performing the promise, as  
the whole life of the party, though the Law will stretch  
the man in time for doing of anything.

Where an Assumpsit or promise is the  
ground of the Action brought, there it must  
be pleaded precisely; but where it is but the inducement  
to the bringing of the Action, there it is not  
necessary, to set forth the promise precisely in  
pleading. *Pasc. 23. Car. B. r.* For the ground of the  
Action which is brought ought to be set forth in the  
Plaintiff's pleading, that the Court may judge whether  
it be cause of Action or not.

Every contract made betwixt parties, doth  
in Law imply a promise that they will perform  
the contract. *Hill. 1649. B. S. 4. Feb.* For else  
the Contract would be idle and to no purpose, for  
of a remedy in Law to compel the parties to  
perform it.

He for whose benefit a promise is made, may have an Action for the breach of this promise, although the promise was not made to him. *Pasc. 23. Car. B. r.* For where the Law gives any benefit to any, there it also affords a remedy to the party to obtain

The consideration to stay his proceedings in a suit in Law, is a good consideration to ground an Assumpsit. *Trin. 23. Car. B. r. vizi* for ever, or for a certain time. But if he promise to stay Paululum tempus, it is held by some not good. For the party to whom the promise is made, shall be intended to receive benefit by the forbearance, and the other party may be prejudiced by forbearing to sue for ever, or for a certain time; but to forbear Paululum tempus, is incertain, and inconsiderable; for it may be but for a minute, which can neither be profitable to the one, or a damage to the other party. Of this 2. for it hath been adjudged both good and bad.

If one part of the consideration, upon which a promise is made to do a thing against the Law, and void; yet if another part of the consideration be good and lawful, the consideration is good to ground an Assumpsit upon, for the consideration may be divided, and if any part of it be good, it is sufficient to make the promise good. *Mich. 23. Car. B. r.* And the promise is the ground of the Action.

An Assumpsit grounded upon a consideration which was past before the promise made, is a good Assumpsit, if it be alledged to be made at the instance or request of the Defendant. *Pasc. 24. Car. B. r.* For if performed at his instance and request, it shall be intended to be for his benefit, and for which he is to make a recompence to the other party.



After a promise is broken, the party that made this promise cannot be discharged of this promise by Parol, but where the promise is executory he may. *Pasc. 24. Car. B. r. For by the breach, a right of Action accrues to the party for the wrong done unto him by the breach, which cannot be released by Parol ; for before breach no injury is done, nor any thing due to the party by the promise.*

Where one becomes legally indebted to another the Law creates a promise, that he will pay this debt, and if he do not pay it, there is a sufficient ground for the party to whom he is indebted, to bring an Action of *Indebitatus Assumpsit*, against him to recover this Debt, *Trin. 24. Car. B. r. For where the Law creates a duty, it doth there give a remedy to cover it.*

If the day of an *Assumpsit* made be pleaded in figures and not in words at length, it is erroneous. *Pasc. 24. Car. B. r. For the time is material, figures are not words to express any thing, and pleading must be in words.*

In an Action brought upon a promise, it is sufficient to ground the Action upon one promise, in the substance of it, but to lay the promise divers ways by different words in the Declaration, to the intent that upon the tryal, the Plaintiff may rest, or rely upon that way of laying, that his witnesses are unable to prove. *Mich. 24. Car. B. r. For if the promise be proved in the substance of it, it is sufficient.*

If one be indebted to another, and do promise to pay this debt at a day to come, the party to whom he made this promise, cannot bring his Action for the Debt until the day be passed upon which he promised.

to pay it, By Roll Chief Justice, and by German Justice; for he said that the promise is a suspension of the Debt. *Pro tempore, 29. Jan. 1650. B. S. Q.*

If one promise unto a woman, that in consideration that she will marry with him, he will intermarry with her; this is a mutual promise, and an action lies by either party against the other for breach of it. *18. Ap. 1650. B. S. For it shall be intended to be made for the benefit of both the parties.*

*Appeal.*

In a Writ of Appeal, all the pleadings are entred in Latin, but Counsel ought to count in French; as in all Actions in the Common Pleas. *Mich. 22. Car.*

If in an Appeal, the Defendant plead in abatement of the Writ, and the Writ be adjudged good, it is remptory, and he shall not be permitted to answer, but shall be condemned upon the Writ. *Mich. Car. B.r. For the more speedy proceeding against such offenders in criminal causes.*

In an appeal, the Appellant ought to appear in court in person, yet upon a motion to the Court, the Court may admit him to prosecute his Suite by Attorney. *Mich. 22. Car. B.r. For there may be reason for his absence.*

The defect in any Proceess in an Appeal, doth continue all the Appeal, and makes an end of the Action, as well as a defect in the Original Writ. *Hill. Car. B.r. This is in favour of life which the Law is tender of.*

*Age.*

If the question be, whether the party be of Age, or within Age, it shall be tryed by the Court by inspection of the party, and not by a Jury. *22. Car. B. r.* And by other concurrent proof made to the Court, as well as by viewing of the party ; for the Court in some cases may be deceived, if they should only upon the view of the party.

*Advantage.*

It is not good practice to take an advantage against the Defendant, to obtain a trival the sooner against him, for it causeth clamour from the party, and makes him (oftentimes) press the Court for a new tryal. *22. Car. B. r.* And the Law would have all proceedings to be fair, and without cause of clamour.

He that will in pleading, take advantage of a particular Statute, must shew particularly, that he is comprised within the Statute. *Pasc. 23. Car. B. r.* For the Court is not bound to take notice of his particular concernment, except he shew how he is concerned : but if it be a general Law, it is otherwise.

*Affize.*

The Kings Bench may hold Plea of Affises of the same County where the Common Pleas sit, and at the same time without Patent ; the reason seemeth to be, because that an Affise *non est placita sed querela*, and so out of the Statute of Mag. Char.

is necessary to have 15. daies between the teste and the return of a Writ of Assise.

An Assise is to be Arraigned in *French*, and first the Defendants Council doth pray the Court, that the Tenant may be called, which the Court grants, and thereupon he is called by the Cryer of the Court, and if upon his calling he do appear, then the Tenants Council do demand Oyer of the Writ of Assise, and the Return of it which is granted, and thereupon he prays leave of the Court that he may Imparle which is granted to a short day after, and the Jury is journed by the Court to appear at that day. *Hil.*

*2. Car. B. r. This is festinum remedium, and no such quick dispatch in other Civil Actions.*

Note that the Jurors that are to trie the Assise, are called Recognitors of the Assize. *Because they take notice of the matter of seisin or disseisin by a matter enquired, after the evidence given to them, or because they acknowledge the matter of fact by their Verdict, as Cowell Recognitors affirms.*

At the day granted unto the Tenant to Imparle to, the Tenant is called, and upon his appearance he pleads to the Assize in Latin, and upon this an Issue is joyned between the parties, and after the Jury Recognitors of the Assize are examined upon oath upon a *voire dire*, whether they had the view of the land in question, and if they say they have had, then they sworn to try the Issue, and the Council do proceed to give them their evidence. *Pasc. 23. Car. B. r.* observe that in these Actions, the Jury view the land in question before evidence given, but in an Ejectment they have the view after evidence, and not then but by presence of the parties.

## Arraignment.

If in an Appeal brought, the Writ be abated, Defendant cannot be Arraigned upon the count which is grounded upon this Writ. *Pasc. 23. Car. 1.* For the Writ is the foundation of the Count, and if fail, the Count must needs fail, for there is no foundation for the Arraignment.

A man was Arraigned for stealing 12 oxen, the prisoner confessed he stole 20. and was again arraigned for the other 8. and had judgment to be hanged. *Apud Nottingham circa 20. Eliz.*

If the Defendant in an Appeal be acquitted, he may be Arraigned at the Kings Suite. *D. 121. Mich. 14. H. 7. Rot. 7. and Trin. 14. R. 174.*

One Awbry that had been (formerly) Indicted for felony upon the Statute for having two Wives, and Outlawed upon this Indictment, was brought to Bar and Arraigned to this effect. First the second on the criminal side, spake thus, Awbry *held up his hand*, which the prisoner did; then he proceeded thus, Awbry thou hast been heretofore Indicted offensively, and thereupon Out-lawed in due course of Law, for having of two Wives, and hast been Arraigned thereupon, what canst thou say for thy self, why thou shouldst not have sentence of death pronounced against thee? Prisoner, I take this exception to the Indictment, that it is not said to be found per. sacramentum duodecim proborum & legalium hominum; and I desire I may have Twisden and Hales assigned for my Council. Counsel. You shall have them. Thereupon the Counsel prayed that the prisoner might bring a Writ of Error.

Reve

reverse the Out-lawry. Court. *Lett him have it.* Note that the Prisoner in such case cannot be admitted to bring a Writ of Error, until he shew some probable matter of Error to warrant it.

In Civil Actions the Defendant may bring a Writ of Error, before he assigns any Error, because the Common-wealth is not there so much concerned, and there he puts in good Bail, to answer damages to the party for his delay; but here can be no such thing done to the Common-wealth,

*Attaint.*

An Attaint doth lie against a Jury, that do give their Verdict, contrary to the evidence that is given unto them. *Pasc. 23. Car. B. r. By the Stat. of 23. H. 7.*

*Audita Querela.*

Where the Bail is detained in prison, in Execution after the judgment, which was given against the principal, is reversed by a Writ of Error; there the Bail may bring an *Audita Querela*, to be discharged. *Pasc. 23. Car. B. r. Because he is unjustly vexed by imprisonment without lawful cause.*

If one be taken in Execution, and is afterwards set at liberty, and then is taken again and detained in prison upon the same Execution, he may bring this *Audita Querela* to be enlarged. *Mich. 24 Car. B. r. For by the enlargement of the prisoner, the Execution is discharged, and an Execution once discharged, is for ever discharged, and cannot be received, for the discharge suppose satisfaction.*



If a Judgment given in another Court be removed into the Kings Bench Court by a Writ of Error, and the party who had the Judgment (notwithstanding the removal of it by the Writ of Error) do bring an Action of debt upon this Judgment in the Court where he obtained the Judgment, as he may do, afterwards pending this Action of Debt, the Judgment be Reversed by a Writ of Error, the Defendant against whom the Judgment was obtained, may bring *Audita Querela*, to be relieved against the Action of Debt, brought upon the Judgment. 3. Feb. 1650. For when the Judgment is reversed upon which the Action of Debt was grounded, there is no cause left to support the Action; and therefore all prosecution of the Action afterwards, is accounted in Law but an unjust vexation, which an *Audita Querela* lies.

One Tritton that was in Execution, brought *Audita Querela*, and prayed he might be Bailed, and it was granted, and he was Bailed by four persons Feb. 1650. B. S. For this Bailing of him is not a charge of the Execution; for by his Baile, he is in custody of the Law, and if he make not out his *Audita Querela*, he or his Bail must render his body in Execution again, or else the Bail must pay the Debt for which he is in Execution.

*Authority.*

Doctor Cowels Book, called the Interpreter, is a Book of Authority, to be urged for Law, for it was condemned to be erroneous and scandalous in Parliament, and by the Authority thereof, was publicly burned as erroneous and scandalous. By Robert Chief Justice.

A Verbal authority given by divers Plaintiffs, in an Action of Trespas, and Ejectment to deliver a Lease Ejectment upon the Land, though the Lease be assigned and Tealed by them off of the Land Let in the Lease, is a good authority to execute this Lease. So held in a Tryal at the Bar, between *Vanlore* and *Brook*. Mich. 1649. 7. Nov. B. S. For nothing passeth from those that deliver the Lease, by vertue of such delivery, but from them that made the Lease, and their authority by word for another to deliver it is no more, than if they had themselves delivered it; and the other is but an instrument to put in Execution the mind of the Lessors, as their own hands had, had it been delivered by themselves.

*Appurtenant and Appendant.*

Yards, Orchards and Gardens, are Appurtenances to a Messuage, but Lands cannot be said to be Appurtenant to a Messuage, though they be used with the Messuage, for the Messuage is a Messuage, though the Lands be taken away. *Hill*. 23. Car. B. r. But yet not so if the Yards, Orchards and Gardens, are taken away from it, for then it becomes but a Cottage or *menement*.

One Messuage cannot be Appurtenant to another Messuage, for they are (both) entire things themselves. *Pase*. 24. Car. B. r. And things that are entire, are so themselves, without relation to other things, as part of, or dependant upon them.

*Account.*

An Action of Account, or an Action of Debt or an Account upon the Case, lies at the election of the Plaintiff, against one for receiving money of a third person for the use of the Plaintiff, although he had no authority given him to receive it. *Hill. Car. B. r.* For it is the interest that the Plaintiff hath in the money paid for his use that gives the cause of Action, and it is a receipt of the money that makes the other party lyable to the Action, it matters not by what Authority he received it.

The Statute of limitations of Actions, doth not bar the Plaintiff from bringing an Action of account although he do not bring the Action within the time limited by the Statute, for before that Statute, that had once cause of Action, might bring it at any time afterward without restriction of time, and an Action is not mentioned in the Statute. *Trin. 1620. Junii. B. S.* And consequently not barred by it, the Statute being in restriction of the Common Law.

An Action of Account doth not lie for Rent (alone) due and arrear, for the Rent demandable is certain, but if the Rent be behind, and there are (also) other things mixed with it, for which the Action is brought, then an Action of Account may be brought for both of them together, because it is uncertain on the whole matter what is due to the Plaintiff. *Trin. 1651. B. S.* For an Action of Account doth not imply that the Plaintiff doth not know what is justly due him, but requires the Defendant to declare and satisfy what is due.

If one receive money due to me upon an Obligation

## *the Accomplish'd Atturney.* 59

or for Rent due to me, I may either have an Action of Account against him as my receiver, or an Action of Debt, or an Account upon the Case, as owing me so much money as he hath received; though all these cases he both receive the money without my consent, *Tri. 1651. B.S.* For by his receipt of anothers money, he hath made himself lyable in Law, to give an Account if the monies be incertain, or to pay them to the party to whom in Law they are due.

### *Auditor.*

Many things are in charge with the Kings Auditors which are not in the Crown. *Pasc. 24. Car. B.r.* for a thing cannot be vested in the Crown, nor taken out of the Crown, but by matter of Record, which the Auditors Books are not.

Auditors assigned by the Court, upon an Action of Account brought to receive the Account, are proper Judges of the cause. *Trin. 24. Car. B.r.* viz. whether the party accountable be in arrear or not.

### *Argument.*

Two that are of Council on one side, ought not to Argue for their Clyent both of them upon one and the same day, except it be for concluding of all the Arguments which are intended to be made for that party. *Mich. 1649. B.S.* By the Custom of the Court. That one of one side and another on the other side, may argue in one day.

It is not the usual course of the Court, for one Councellour to argue the same Case twice. By Rolle Chief Justice. 12, Nov. 1650. B.S. For it is intended, that

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*that when he first Argued, he said all be could for my Clyent, and the Court will not admit the same matter to be repeated, but will hear what another can say there be cause.*

### *Aide and Aide Prayer.*

*A Tenant for life may pray in Aide of all such persons as are in remainder of estate in the Lands which he is impleaded. 1649. 29. Julii, B. S. For they are all concerned by reason of their several interests, to defend the particular Estate upon which their remainders depend.*

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### *Baron and Fem.*

**A**N ACTION of Debt doth lie against the Husband for goods that were delivered to his Wife, may be intended that those goods did any way come to the use of the Husband. *Hill. 21. O. C. B. r.* If they come to the use of the Wife, they in Law said to come to the use of the Husband; the Husband and Wife are but one person in Law. *hoc Q.*

*A Fem Covert cannot submit to an Award, for submission is a free Act of will, and the will of a Fem Covert is subject to the will of her Husband, and she is not free. Mich. 22. Car. B. r. But another person may submit to an Award for a matter which concerns the Fem, and such a submission is a good submission.*

*For m. For it may be he may receive benefit by the Submissi-  
ma yet if he do not, it matters not.*

*say,* A Feofment made to a Fem Covert is a good Feof-  
ment in Law to pass the Lands, if the Husband do  
know of it, until the Husband do disagree to it, for if  
he disagree from it, the Feofment is not good; for  
if he disagree to it, it doth not appear but that he  
consented to it, and a Wife may give or take with  
the consent of her Husband; for such giving and  
taking are said in Law to be the Acts of the Husband  
and not of the Wife: but if he once agree to it,  
he cannot afterwards disagree from it, and if he  
once disagree, he cannot afterwards agree to

*2. Hill. 23. Car. B. r. For this were to do and  
do.*

A Fem Covert may take a thing, though it be not  
Deed. *Hill. 23. Car. B. r. viz. If her Husband  
consent to it, for it shall be intended for his bene-*

*usbe* If a Fem sole be indebted to I. S. and afterward  
*fe,* the Fem doth marry, this Debt is become by the  
*w* marriage, the Debt of the Husband and of the Wife,  
*. O* viz. the proper Debt of the Wife, and the Debt of  
*bey* the Husband in right of his Wife, and the Wife must  
*d ;* be sued for this Debt joyntly with her Husband; and  
*w* if the Husband die, pending the Suite, yet is not  
*for* the Debt gone, but she may be sued for it after the  
*a F* death of her Husband; but if the Husband be not  
*and* sued for this Debt during the life of his Wife, he  
*pe* can never be sued for it after her death. *Pasc.  
tion.* *Car. & Trin. 24. Car. B. r. Viz. By a new*

*once* If a Writ be sued out against Husband and Wife,  
*iff* and



and the Wife only be arrested and detained in prison she shall file a common Bayle, and have a perseadeas to discharge her; but if her Husband be arrested, he must appear for himself and Wife. Per Magistrum Livesay, & alios &c. Pas. Car. secundi Regis.

*Bar in Actions.*

A Recovery in a personal Action, is a Bar in all other personal Actions touching the same matter.

21. Car. B. r. That is to say, it is a Plea in Bar in a personal Action brought against the Defendant, that the Plaintiff did formerly bring an Action against him for the same matter, and did recover against him, and therefore he prays the Judgment of the Court, that he shall be permitted to proceed in his second Action; for no man is to be doubly vexed for cause.

In an Action brought to recover a thing from another, if a recovery be thereupon had by the Plaintiff, the Defendant may plead this recovery in Bar of a second Action brought against him for the same thing. 21. Car. B. r. for the reason aforesaid.

A Plea in Bar which doth not give a full answer to all the matter which is contained in the Plaintiff's Declaration is not a good Plea. 21. Car. B. r. If it answer not all the material matter of it. For it appears by the matter of the Declaration unanswered, that the Plaintiff hath cause of Action notwithstanding that which the Defendant hath said to the contrary.

If the Plaintiff do reply to the Defendants Plea in Bar, this replication is a confession in Law, that

in Bar is a good Plea as to the matter of form, though the Plea be not good. *Trin. 23. Car. B. r.* the Plaintiff hath slipped his advantage of Depending to the Defendants insufficient Plea by replying to it.

If an Action of Debt be brought against any one, he imparles till the next Term, yet after his Imparance, he may plead that the Plaintiff is Out-lawed in Bar of the Action. *Trin. 22. Car. B. r.* For an out-lawed person cannot take any advantage of the Law against another so long as he stands Out-lawed. But a Plea of abatement of ancient Demesne &c. must be pleaded before Imparance; because when the Defendant Imparles, he admits the Court to have Jurisdiction of the Cause.

*Baile.*

By Glyn Chief Justice, *Trin. 1657.* If Common Bail be put in to the Plaintiff in an Action depending there, that Baile so put in, is lyable to be common to all other persons that shall put in Declarations against him, so that the Declarations be in the same Term. This is the course of the Court.

In the Case of *Jones versus Price*, it was said by Chief Justice, *Trin. 1657.* That although one be Bail for the Defendant in an Action, yet he may be Bail for the Plaintiff in the same Action. *Q.* the Baile seems to be concerned in the Try-

one that is in Execution, is notailable by the Plea. *Hill. 21. Car. B. r.* For Bail is put in to secure the Plaintiff, that the Defendant shall perform the Judgment requiring *per. Baile aff. Trin. 1657.*

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ment of the Court, and now the Law haib deter-  
the matter, and there remains only for the Defendant  
perform the Judgment, and for the not performing it  
lies in Execution.

70. -

Before a *Capias* is taken out against the Bail,  
Principal may render his body to the Marshal of  
Court. And then the Defendants Atturney ought  
get a Certificate from the prison, that the De-  
dant is in custody; and thereupon the Master of  
Office will discharge the Bail peece, by writing  
didit se upon it: otherwise the Bail are charged  
notwithstanding the Prisoner is in custodie, Sta-  
ters 17. per Cur. Trin. 18. Car. 2di.

One that had been Indicted thirteen years be-  
for suspicion of murder in poisoning his servant,  
brought in Court by a *Habeas Corpus*, and was  
ed to answer the fact. 21 Car. B. r. This was  
mitted by the Court to be done; because the Pri-  
er had been so long in Prison without any presen-  
on of the Endictment against him, in favour of  
berty.

Though one that is in Execution, do bring a  
of Error to reverse the Judgment given against him,  
yet the Court will not Bail him, except there app-  
unto them very apparent Error in the Record.  
Car. B. r. For else they will suppose that the Writ of  
ror is only brought to gain the parties liberty, and so  
frustrate the effect of the Execution.

That if the Defendant render himself to custody  
in discharge of his bail, upon the day of the Return  
of the second Scire facias against the Bail, Sedes  
Cur. or if an Action be brought upon the Return

ance if he render himself upon the day of the return of the Writ against the Bail, sedente Cur. the Bail are discharged. Per Magistrum Livesay & Jos, Pasc. 21. Car. 2. Reg. 567 134..

One *Arnold James* that was Bailed in 44. and . year of *Q. Eliz.* upon a Judgment given against him in the Lord Majors Court of *London*, was brought into Court by a *Habeas Corpus*. *Trin. 22. Car.* . The prisoner was suffered to bring his *Habeas Corpus* because he had gone under Bail so long, and no profession against him that he might discharge his Bail.

The Court did take Bail for a prisoner, against whom an Appeal of murder was brought, because that he did not flee for the murder supposed, and had been formerly Indicted for this murder, and acquitted upon the Indictment. *Mich. 22. Car. B. r.* Upon which presumptions they concluded he was not guilty, else would not have Bailed him.

Bail pieces are small pieces of Parchment, in which is written the substance of the Bail, and are filed in the Office of the Court. *Mich. 22. Car. B. r.*

If the Plaintiff require special Bail, he ought to shew his cause of Action, before the Judge that takes Bail; or else, to declare against the Defendant, that it may appear to the Court, that there is cause, why special Bail should be given, otherwaies common Bail is to be filed. But now by a late Statute, if the Plaintiff do not shew the cause of Action in his Writ by way of Bill, &c. the Defendant may file a common Bail. And if he will declare against the Defendant till after 3. Terms, and by the course of the Court he must take common Bail what ever the cause of Action be. *Hill. 22. Car.*

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*Car. B. r. Trin. 24. Car. 1650. 22. Junii. For shall be intended that the cause of Action is not so great to require special Bail because the Plaintiff makes no haste to proceed.*

Where one is sued as an Executor, he is not compellable to put in special Bail; but in case of a *Deftavit* for wasting the goods of the Testator, or where the Action is brought for something done by him since he became Executor, and that must be by motion in Court. *Hill. 22. Car. B. r. Note, for in the former case he is lyable no further than he hath assets, because the cause of Action never so great; but in the latter cases he must and therefore shall put in Bail, such as the Action may require if he were not Executor.*

If an Action be brought against Husband and Wife, and the Husband is only Arrested; yet the Husband must put in Bail for his Wife, if the name of the Wife be in the Writ, else he is not bound to put in Bail for her. *Hill. 22. Car. B. r. For it is the Writ that warrants the Bail.*

One may depofite a sum of money in Court in lieu of Bail, if the Court please, and they may thereupon order the Plaintiff to waive other Bail. *22. Car. & Trin. 23. Car. B. r. If the sum deposited be sufficient to satisfy the Plaintiff in case the Tryal comes for him; for then the Plaintiff can suffer no inconvenience by it; for the Court may order him to have the money deposited, for his satisfaction after such Tryal had.*

If the Defendant do render his body in custody in discharge of his Bail; the Plaintiff ought to conform to the Rules of the Court to make his choice whether he will proceed afterwards against the Principal or the Bail. *Hill. 22. Car. B. r. For because*

*the Accomplish'd Atturney.* 67

to proceed against both, and now it is in his power to  
make his election,

After the Roll is marked to have special Bail, <sup>69. 71.</sup>  
common Bail ought not to be entred; but if the  
Roll be not marked for special Bail, common Bail  
may be entred. *Hill. Car. B. r.* For nothing ap-  
pears to the Court that special Bail was required, and  
common Bail is to be filed of course.

One that stands Indicted for Felony, or for For-  
feiture, ought not to be Bailed, until he have pleaded to  
the Indictment. *Pasc. & Trin. 23. Car. B. r.* For the parties  
ought to be conceived to be guilty of the Crimes until they  
plead: and there is difference between Criminal offences,  
and civil Actions.

If one be committed to prison by the House of  
Commons in Parliament, the Court will Bail the par-  
ty. In respect of his Fact he is Bailable in Law. *Pasc.*  
*Car. B. r. 2.*

The Court will not Bail one that appears in  
Court upon the Return of his *Habeas Corpus*, be-  
cause they have considered of the Return, to en-  
quire themselves whether he is Bailable by the Law  
or not. *Pasc. 23. Car. B. r.* For before that, it doth  
not appear judicially to the Court for what cause the par-  
ty was committed.

One committed by a Justice of Peace upon the Sta-  
tute for having of two Wives, and appearing in  
Court upon the Return of his *Habeas Corpus*, was  
Bailed upon the prayer of his Council. *Trin. 23.*  
*B. r.*

Where the not filing of common Bail, will make  
a difference in the Record, there the Court will compel the  
party to accept of it. *Trin. 23. Car. B. r.* Viz. In such  
cases where common Bail was to be accepted.



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One that is within Age, is not to be admitted Bail for another. *Trin. 23. Car. B. r.* For he is person ( of himself ) responsible at the Law ; and that is Bail must be for him for whom he be Bail.

One committed for Fe'ony and brought into Court by his *Habeas Corpus*, may not be Bailed less than four Suerties. *Hill, 23 Car. B. r.* For the being Capital, requires extraordinary Bail, in respect the Kingdoms concernment.

The putting in of a Declaration, and the accepting of it by the Defendants Attorney, with the presence of the Plaintiffs Attorney, is counted an accepting of the Bail. *Hill. 23. Car. B. r. & 1650. Pasc. 14.* For by accepting the Declaration he takes upon himself to plead.

After Bail put in before a Judge, the Plaintiff has daies time to except against it, which if he doth not do, then the Defendants Attorney may take it from the Judges Chamber, and file it *volens* with the Plaintiffs Attorney, and if the Defendants do not file it in time, he incurs the penalty of *Mich. 17. Reg. per Cur.*

If a privileged person in this Court, do bring an Action against another in this Court, he ought to take the course of the Court to have special Bail put for his Action. *Hill. 23. Car. B. r.* Whether the cause for special Bail or not. This I suppose is certain.

Though one be Assigned by the Court to be Counsel on Record for a prisoner that stands Indicted of Felony, yet he ought not to move to have the prisoner Bailed. *Pasc. 24. Car. B. r.* For he may not move for things against Law.

One that is Out-lawed, ought not to be Bailed  
 either the Out-lawry be Reversed, or else he  
 brought a Writ of Error to Reverse it. *Pasc. Car.*  
*For an Out-lawed person is to receive no favour in*  
*Law; for the Law takes not notice of an Out-lawed*  
*man as a Subject, but as a Rebel.*

One single Judge will not Bail a prisoner in a dif-  
 ficult case, but will advise with his Companions. *Pasc.*  
*Car. B. r. So cautious are they not to do any thing*  
*against Law.*

One that is in Execution, in custody of the Mar-  
 shal of this Court is not compellable to find Bail if  
 an Action be brought against him, but if he be  
 in the prison of the Fleet in Execution, and an Action  
 brought against him in this Court, he must either  
 be removed and committed unto the custody of the  
 Marshal of this Court, or else he must put in Bail to  
 answer the Action. *Trin. 24. Car. B. r. For when he is in custo-*  
*dy there needs no Bail to bring in his person, for he is*  
*bound to be alwayes in Court ready to answer the*  
*action; but he that is a prisoner in the Fleet, though*  
*he be in prison, yet this Court can have no cer-*  
*tainty to bring in his person to appear here; and*  
*therefore he must either be committed here, or put in*

Before a *Superfedeas* be issued forth upon a Writ of  
 Error brought, he that brings the Writ of Error in  
 the cases limited by several Statutes, ought to put  
 special Bail to pay what shall be due, if the judg-  
 ment be affirmed. *Trin. 24. Car. B. r. Because thereby*  
*they stop execution, and so delays the Plaintiff, and puts*  
*him to extraordinary charges.*

It is not sufficient for the Plaintiffs Attorney only  
 to mark the Roll for special Bail, but he ought also

to give the Defendants Attorney notice that. *Sp. Bail* is required to the Action. *Mich. 24. Car.* For the Roll may be marked without notice, and know nothing of it, and plain practice is always best, and most beneficial for Plaintiff and Defendant.

Upon a Bail put in upon a Habeas Corpus turnable immediate, if it be in *Hill. or Trin.* and the Declaration be delivered 8. daies before end of the Term, then the Defendant must plead enter : but if it be in *Mich. Term*, and the Declaration be delivered before *Crastin. Anim.* or in *E. Term* before *Mens. Pasc.* then the Defendant plead to try the same Term. Per Magistrum *Lives & alios, Pas. 21. Car. secundi Regis.*

If the Judgment be reversed by a Writ of Error which was given against the Principal, there may a special Writ taken out to discharge the Bail. *Mich. 24. Car. B. r.* For a discharge of the Principal is a charge in Law of the Bail.

Bail is to be accounted good Bail, which is *de bene esse*, and before it be filed until it be questioned, and disallowed. *Mich. 24. Car. B. r.* Upon examination of it before the Judge *Hill. 1649. 11.* For before that, it appears not that the Plaintiff accepts of it.

Bail is so called because the party bailed is delivered by the Law into the custody of those that are Bail, and who are to answer the party if they do produce the principal to do it. *Trin. 1650. B. R. Junii.* It is derived of the French word *Bailler*, to deliver a thing to another.

If the Plaintiff do not declare against the Defendant in three Terms after Bail is put in, the Bail is chargeable. *Trin. 1650. 2. Julii. For then the Defendant is to go only upon common Bail by the Rules of Court.*

If the Plaintiffs Atturney do only tell the Defendants Atturney, that his Clyent is to put in special Bail, it is sufficient; and there common Bail is not to be admitted, although the Roll be not marked for special Bail. *3. Feb. 1650. B. S. For the notice that there ought to be special Bail, is the thing required, and the marking of the Roll, is but to give notice.*

If one that lies in Execution do bring his *Audita Querela*, he is Bailable. *7. Feb. 1650. B. R. Held in Trittons Case. But it must be special Bail.*

By a Rule of the Court, the Plaintiffs Atturney must receive the Bail given before the Judge, from the Judge himself the same Term it was put in, upon pain of five shillings. *21. Feb. 1650. B. R. For it commands the Judge to be cautious in taking of Bail, and to that there be no miscarriage in it.*

When one becomes Bail for another in an Action of Debt, he doth (in Law) assume or take upon him to answer the body of the Principal, if he be condemned, or else to pay the Debt he is condemned in. *Pasc. 52. per Rolle. B. R. And if he do either, it is sufficient discharge himself.*

Until a *Capias* be Returned against the Principal, the Bail shall not forfeit his Recognizance for the Principals not appearance, by the Ancient Course of the Court; but at this day by the indulgence of the Court he shall not forfeit his Recognizance, if the

Principal come in at any time before the Return of the second *Scire Facias* against the Bail. *Trin. 1656. B.S. This is in favour of the Bail, and the Plaintiff is much prejudiced thereby.*

If one that is to be a witness in the cause be sued for Bail in the same cause, upon a motion and offer of sufficient Bail tendred in his room, the Court will discharge that Bail given, and order the Plaintiff to accept of the Bail tendred. This was done in the Case of the Lady Gray. *Pasc. 1656. Else it would be mischievous to the Defendant, for a Bail cannot be a witness, he is concerned in the cause.*

If one be sued in this Court for ten pounds or above, the Plaintiff may by the course of the Court require special Bail, but if he be sued for a less sum, common Bail is to be accepted. *For the Law thinks not to trouble the Defendant to put in special Bail for so small a sum.*

Special Bail is not (generally) to be given in an Action of Battery, yet in some such cases, the Court will compel the Defendant to put in special Bail, where they perceive it was a foul Battery, and much damage done by it to the Defendant; else the Action of Battery, is thought a slight Action, and not worthy of special Bail. *For the Bail is given in respect of answering the Plaintiff his damages which may require special Bail.*

In the Case of *Osborn* against *Chamworth*, *Pasc. 1656* it was said by *Glyn Chief Justice*, That if the Defendant doth tender sufficient Bail to the Plaintiff, and he will not accept of it, that the Court upon examination of the matter, and finding the Bail to be sufficient, may take it and allow of it whether the Plaintiff will or no. *For the Court is an indifferent Judge betwixt the parties.*

If there be no Writ in the Roll, nor any note given for special Bail, and common Bail is demanded, the Plaintiff cannot by the course of the Court, require special Bail. By Rolle Chief Justice. *For it was the Plaintiffs fault he had no other*

Bail is not to be accounted Bail (properly) until it is filed, for then and not before it is upon Record. By Rolle Chief Justice. *Viz. so as the Court may take notice of it.*

If the Defendant put in Bail before a Judge, and it is allowed, and yet he will not file it, the Plaintiff may nevertheless will at his own charge file it. By Rolle Chief Justice. *Pasc. 1655. to avoid Error, otherwise it might be chievous to the Plaintiff.*

In the Case of *Walker* against *Bury Trin. 1658.* by Chief Justice, the Defendant cannot change his turney without leave of the Court, *Q. tamen*, and whether the Plaintiff may do it. It seems not. *Nam eadem in utrisque.*

If Bail be taken by the Judge, *de bene esse*, the Plaintiff ought by the Rules of the Court, either to allow the Bail, or to shew cause to the contrary. By Rolle. *That if it be good, he may be forced to accept it, or if it be not, that the Defendant may provide for other Bail.*

The sufficiency or non sufficiency of Bail ought to be first examined by the Judge at his Chamber, before the Court is to be troubled with the matter; for the Court is not to be troubled in settling of matters ordinary proceedings, but if the Judge cannot make the Plaintiff and Defendant agree in the giving and taking of the Bail, then the Court is to be moved in



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in it ; whereupon they will order both parties to attend and the Bail also, and will examine the cause of Action, and the Bails sufficiency, and settle the matters in difference according to reason. By Rolle Chief Justice; which both parties must abide by.

By the new Rules of this Court, an Attorney ought not to require special Bail to his Action, except the Cause of his Action doth by the Rules of the Court require it.

By Glyn Chief Justice, If one be brought into Court by a *Habeas Corpus* and doth put in Bail, that Bail is lyable to all Actions, which this Plaintiff, at whose Suite he is brought in, wherein he shall declare against the Defendant at any time within three Terms next after, but not afterwards. Pasch. 1656. B. S. For if there be no Declaration against him within three Terms, he may by the course of the Court go at large upon common Bail.

The cause of marking the Roll for special Bail in this Court was chiefly, because the cause of Action did not appear upon the Latitat, by which the party was Arrested, but it was to be made appear by the Declaration. By Glyn Chief Justice. But now the course of the Court is otherwise ; for special Bail cannot be required but where the cause of Action is contained in the Writ, and in the Common Pleas where they proceed upon the Original, the cause of Action doth appear, and there is no need of marking the Roll for special Bail.

If Judgment be affirmed upon a Writ of Error in the Exchequer Chamber, no Execution shall be against the Bail in the Original Action for the

offis taxed Occafione Dilationis, Per Magiftrum  
iveſay & alios &c. Paſc. 21. Caroli ſecundi  
egis.

*Burglary.*

Burglary may be committed by one, though he  
do not break a houſe open, for if he be within the  
houſe, and ſteal away the goods in the houſe;  
and open the houſe on the inſide, and go out and  
carry away the goods, this is Burglary. *Trin. 22.*  
*Car. B. r.* For this is in Law a violating of the  
houſe, and depriving of the Dweller of his ſafetie  
it.

*Bankrupt.*

He that is a Bankrupt to one Creditor, is account-  
(in Law) to be a Bankrupt to all. *22. Car. B. r.*  
For he is a Bankrupt in reſpect of himſelf and his  
Eſtate, and not in relation to any particular perſon  
only.

He that is once adjudged to be a Bankrupt, is to  
alwaies accounted to be a Bankrupt. *22. Car. B. r.*  
to the reſt of his Creditors when he was ſo adjudged  
to be.

If one ſhall with an intent to ſupport the credit of  
a Bankrupt, ſuffer him to have his goods in cuſtody,  
and to diſpoſe of them, the property of theſe goods  
ſhall be accounted to be in the Bankrupt, and the  
owner of the goods ſhall loſe the property  
of them. *18. Ap. 1501. B. Sup.* As a puniſhment  
for his falſe dealing herein, and of the miſchiefs  
which may grow by ſuch devices to evade the Laws. For  
the

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*the Law cannot take notice of such private things between the parties, but will judge of things as they appear to be.*

### *Breach.*

Where one brings an Action for a Covenant broken, he ought to Assign the breach of it in such manner that the Defendant may justify or take an issue. *Hill. 22. Car. B. r.* Else the party can make no defence for himself, because his charge is incertain.

If one bring an Action of Covenant against another, for not repairing houses, &c. demised unto him, he ought to Assign particularly where the want of reparations do consist, and not to declare generally. *Hill. 22. Car. B. r.* For reparations do consist of particulars; and if they be Assigned generally, for want of them, the Defendant cannot tell how to give an answer.

If an Action of Debt be brought upon an Obligation for breach of the condition thereof, the Plaintiff is not to Assign in what the breach is, untill the Defendant hath pleaded performance of the condition. *Hill. 22. Car. B. r.* For before such Plea, the Declaration shall be taken to be true that the condition is broken either in all or in part, and so there needs no assignment of breach.

### *Bailiff.*

A Bailiff may execute a Writ out of the Hundred where he is Bailiff. *Pasc. 23. Car. B. r.* For he is Bailiff of the County over, if he be the Sheriff's Bailiff, and not a Bailiff of some Liberty within the County.

## *the Accomplish'd Atturney.* 77

A Bailiff is a servant or minister of the Law, and by consequence he is a servant to the party, at whose suite he is to Arrest any one, *Pasc. 24. Car. B. r. And therefore is answerable to the Law, and to the party for miscarriages in his place.*

A Sheriffs Bailiff is not an Officer of the Court, but the Sheriff himself is the Officer that the Court takes notice of. *Pasc. 24. Car. B. r. 2.*

### *Bargain and Sail.*

A Bargain and Sail made by one who is not in possession, though it be by Deed inrolled, is not good if there be no Livery thereupon. *Mich. 23. Car. B. r. But there be Livery it passeth, for the making of the Livery opposeth him in possession.*

If one buy a thing of another, he that buyes it ought to pay the money he hath agreed to pay for it, before the seller of it is bound to deliver it. *Pasc. 23. Car. B. r. For that is the contract betwixt the buyer and the seller, I will give you so much money, and you shall give me such a thing; and what difference may be betwixt buying of a thing for money, and bartering or exchanging one thing for another.*

One may upon a good consideration, dissolve by enrol onely an absolute Bargain. *Pasc. 24. Car. r.*

One may sell his priviledge given him by the Law his birthright, as a free-born subject, for a good consideration. *Trin. 24. Car. B. r. For it shall be intended that he hath a sufficient recompense for it, and hath no wrong done him by it; but 2. what priviledges he may sell.*

If one that is indebted, do really and bona fide sell his

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his Lands, though it be with an intent to an-  
the paiment of his Debts; this sale is good, if  
Vendes be not privy to his intent. *Mich. 24. Car.*  
*For as to the Vendee there is no fraud in the C*  
*and he comes to the lands upon a valuable consi-*  
*deration.*

If one Bargain and Sell Lands, of which ano-  
ther is in possession, and claims title to them, this Bargain  
and Sell is not good. *Trin. 1651. B. S.* Because  
*a litigious title, the buying where the Law doth not allow*  
*For this would be a means to nourish Suites in Law,*  
*the end of the Law is to settle peace, and quiet possession*  
*and not to disturb them.*

### *Battery.*

To lay ones hands lightly or gently upon another  
though he have no occasion so to do, is no Battery  
ground an Action upon. *Trin. 24. Car. B. r.* For  
*Law will not presume the party is damnified by the doing*  
*thereof, and so hath no right of an Action.*

### *Bill.*

There is difference betwixt an Inland Bill of Ex-  
change, and an Outland Bill of Exchange, which  
made to return moneys beyond the Seas; for an In-  
land Bill is but in nature of a Letter, but an Out-  
land Bill is of another nature and more regarded  
the eye of the Law. *3. July 1650. B. S.* Because  
*more for the advance of the trade of the Nation with other*  
*Countries, and is therefore of more publick concernment*

*Book.*

When Books are delivered to the Judges, in causes which are to be argued; the Attorneys that deliver Books, ought to write the number Roll of the cases to be argued upon the Book, otherwise they not receive them. *Mich. 22. Car. B. r. That they know in what year and term, the causes were entred, they may have recourse to the Records of those cases on any occasion.*

The Books which are to be delivered to the Judges in causes to be argued, are to be made at the equal charge of the Plaintiff and Defendant. *Pas. 23. Car. B. r. the Law being doubtful in such Causes which are to be argued, whether it be on the Plaintiffs side, or on the Defendants; the arguing of the Case doth equally concern both, and therefore it is Reason they should be at an equal charge in bringing the cause to be argued and determined.*

When Books are to be delivered to the Judges, in causes which are to be argued; the Plaintiff ought to deliver Books to the Seignior Judges, and the Defendant ought to give Books to the puisne Judges. *Hill. 9. B. S. But it matters not by whom the Books are delivered, so they have all of them Books delivered.*

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*Courts and their Jurisdiction.*

The Court of the Kings Bench, is a high Court where the Pleas of the Crown are agitated, and of, viz. all manner of Treasons, Misprisions of Treasons,



Treasons, Felonies, &c. and this by the Common Law, without any Patent or Commission, and the King is intended by Law to sit there.

In this Court is also Tryable all Offences *Contra Pacem*, or *Vi & Armis*, and all Personal Actions.

This Court is removeable at the Kings pleasure.

In the Kings Bench the Pleas are held *coram Rege*; and therefore it is the Kings most high Court and above the Chancery.

The Kings Bench may command a Prisoner of any other Court by *Habeas Corpus cum Causa*, before them, though he be in the Tower upon the Privy Counceils Command.

Cardinal *Wolsey* being Chancellour of England committed one to the *Fleet*, who was brought to this Court by a *Habeas corpus cum Causa*, and a writ given to the Kings Attourney to shew why he should not be delivered, and the party after two daies was dismissed.

*Gascoigne* Chief Justice committed the Prince of Wales cause he would have taken a Prisoner from the Barr.

The Court of York hath no power to award a writ *pias* in an Action upon the Case, by the Statute of *H. 7. Hill. 21. Car. B. r. vid. the Statute.*

Inferiour Courts ought not in pleading to shew anything by implication, but they must set it out expressly, and also *Surplusage* in an inferiour Court may make error, for they must keep their forms precisely. *Hill. 21. B. r.* For if they should be suffered to break their forms, it would introduce all barbarism and confusion, which the Law doth labour to prevent as things dangerous to the Realm.

If a condition of an Obligation for the payment of money, do expresse no place where the money is to be paid; if the Obligee bring an Action of Debt upon this Obligation for non-payment of the money according to the Condition of this Obligation, he must make it appear that the money was to be paid within the jurisdiction of the Court, where he brings his Action, or else the Action is not well laid, *Hill. 21.*

*B. r. For it is brought coram non Judice for ought to appear.*

The jurisdiction of an inferiour Court must be set forth, and by what authority it is held, whether by Prescription or Letters Patents, otherwise it is Error.

*21. Car. B. r. For every inferiour Court must be one of those waies, and if no authority be set forth this Court will not presume there is a-*

The Court of Admiralty cannot hold Plea of a matter arising from a contract made upon the land, though the contract was made concerning things belonging to the Ship. *Hill. 21. Car. B. r. For such matters are only tryable by the Common Law, and though the contract concerns things belonging to Sea affairs, yet it is but collateral, and the principal direct matter to which the action upon is the contract.*

In the year of 4. H. 4. there was a petition presented in the Parliament against the Court of Admiralty, for holding of Pleas by the Spiritual Law, which they ought not to do, but by the Laws of Oleron, and this was held by the House of Commons in Parliament at that time. *Hill. 21. Car. B. r. The Laws of Oleron were particular Laws made at Oleron Island belonging to France touching Maritime matters.*

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If goods delivered a Ship-board be embezzled the Mariners ought to contribute to the satisfaction of the party that lost his goods ; every one of them particularly according to their proportions, by Maritime Law or Custome, and the cause is tried in the Court of the Admiralty, and in such cases no prohibition ought to be granted. *Hill. Car. B. r. Because the matter arises solely upon Maritime custome, whereof the Common Law cannot take notice.*

The Court of Admiralty ought not to try where a fact were done in a place which is comprehended within a League made with a Forraign Prince, whether the place be without or not, nor ought they to try whether the League were made at the time of the fact done or no. *21. Car. B. r. Because the League is not traversable and issuable at Law.*

No Court can set a fine upon any person, for an offence committed by him, for which they can grant him a pardon for his offence, when he has paid the fine that is so set upon him. *21. Car. 4. H. 7. 5. 21. H. 7. 35. For the Fine is paid in lieu of satisfaction for the offence, and it is not to be called in question again for the one and the same offence.*

The Court ought *Ex officio* to take notice of matters contained in the Record of the matter depending before them, but they are not tyed to search the manack to compute the times of doing things. *Car. B. r. For that ought to be set forth by the parties.*

An inferiour Court ought to Return a Writ directed

to them to stop their proceedings, although they are not bound to allow the Writ directed to them by giving obedience unto it, and in their Return of the writ they are to shew, why they do not allow it, and do proceed notwithstanding the Writ directed unto them. 22. Car. B. r. *That they may not seem to diminish the Authority above them, otherwise an Attatchment lies against them.*

If a Court which hath no Jurisdiction of the cause depending in that Court do proceed to Judgment in the Judgement is good if the Defendant did plead to the Jurisdiction of the Court, but he hath admitted it to have jurisdiction of the cause, by making his defence, but 2. if it be not Error upon a writ of Error brought. 22. Car. B. r. *Which was (once) is power to allow or disallow, as he pleased; but having disallowed it when he might, he shall be bound to have allowed the jurisdiction, and it shall be presumed that the Court hath done justice to the party, although they had legally no conscience of the case.*

Although one plead in disallowance of the jurisdiction of a Court, yet he may (afterwards) come in and allow the jurisdiction and plead there. Mich. 22. B. r. *For the Plea is not peremptory, but dilatory, and therefore be waived.*

The Court of the Kings Bench, is to regulate all Courts of Law throughout England, that they do not exceed their jurisdictions nor alter their forms. Car. B. r. *For it is the highest Court of Judicature in England, being held coram ipso Rege, who is Fons Juris, and the other Courts are but as streams flowing from this Fountain.*

In some cases the jurisdiction of the Courts of the

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Cinque Ports extendeth upon the high Sea. *Mich. Car. B. r.* This is by special priviledges afforded the regard of their great services they are bound upon sion to perform for the Realme.

This Court may commit an Atturney, for doing things against the expresse Rules of the Court, and rice of it. *22. Car. B. r.* For this is a contempt to the thority thereof.

This Court may issue out a Writ, to compel that is elected to the Office of Constable, and fufeth to serve, to take his oath and to ex his Office. *Mich. 22. Car. B. r.* For where or ry means will not serve to remove obstructions in government of the Common wealth, this Court may pose.

The superiour Courts at *Westminster*, and the riour Courts elsewhere, do differ in their form proceedings in many things. *Mich. 22. Car.* But this is not true of all inferior Courts, for some them do use the same forms as are used in the Court *Westminster*.

A Court that holds Plea by vertue of Letters tents, ought to proceed according to the Court the Common Law ; for no Patents ought to granted against the Course of the Common Law. Courts that are Courts by Custom, are not bound to proceed according to the strict Rules of the Common Law ; but may proceed according to their form. *Mich. 22. Car. B. r.* So that their Customs be contrary to Law.

One may sue in the Kings Bench Court, Action upon the Case and Trespas by Original, as well as may by Bill of *Middlesex* or Writ of Latitat ; but the common and most usual way of proceeding is by *Mich. 22. Car. B. r.*

A County Court cannot enquire of dammages arising out of the jurisdiction of it. *Hill. 22. Car. B. r.* it hath not consance of things arising out of his jurisdiction.

One ought not to Sue to Bastardise an Issue, in the Ecclesiastical Court, but the tryal lies at the Common Law.

Whether a Wife or not a Wife, is tryable at the Common Law; but whether lawfully married or not lawfully married, is tryable in the Spiritual Court.

*23. Car. B. r.* For a marriage is pleaded to be according to the Laws of the holy Church, viz. the Ecclesiastical Laws; and therefore most proper for them to determine whether the marriage were solemnized accordingly: but whether married or not married, is tryable at the Common Law, for that is matter of fact, and not matter of Spiritual Law, and so not determinable by the Judges of the Spiritual Court, no more than matters of Spirituality are tryable by the Judges of the Common Law.

Where the principal matter is tryable in the Spiritual Court, and there is (also) a thing incident to the tryal, which is tryable at the Common Law, yet prohibition shall not there be granted, *Pas. 23. Car.*

*Quia principale, trahit ad se accessorium suum.* And the principal matter being tryable in the Spiritual Court, the Common Law is not to intermeddle, for this would obstruct justice.

A Recognizance in the Common Pleas is entred specially, but a Recognizance in the Kings Bench, is entred generally. *Pasc. 23. Car. B. r.* The difference betwixt a general entry and a special, I conceive is, that a general entry is more short, and a special entry is more large and plain; yet the substance is sufficiently contained in the general entry.



In the Universities they hold Pleas by custom, do proceed according to the Rules of the Civil Law. *Pasc. 23. Car. B. r. Such proceedings suite best with the Civil Law because the Civil Laws are written in Latin, and the Civil Law is there only studied.*

In the Court of the City of Exeter, they proceed in that manner as they do in the Common Pleas, they do not so generally in other inferiour Courts. *Pasc. 23. Car. B. r. But in Norwich they proceed as they do at Exeter, agreeing with the Common Pleas.*

The Common Pleas doth not shew at large, where the venue shall come, but inferiour Courts ought to shew it at large, and not with an &c. as the Common Pleas doth. *Pasc. 23. Car. B. r. For they ought to shew it at large, and they ought not to vary from the forms.*

The Court of the publick Exchequer is a Court of Record, and doth consist of Law and Equity. *Pasc. 23. Car. B. r. The Pleas side is for matters of Law, and the Chequer-Chamber for matters of Equity. In the Pleas side they proceed in Latin, and in the Chequer-Chamber by English Bill answer &c. and Chancery.*

The Court of the Kings Bench, is a Court of Record in that County where soever it sits. *Trin. 22. Car. B. r. For it is not a fixt Court as the Common Pleas Court is, but removeable; and it is also such in regard of the large extent of jurisdiction in the consuance of all matters either Civil or Criminal which it hath in that County where it sits.*

The Court of the Common Council of London is not a Court of Record; but only a Court of Advice, and therefore neither a Writ of Error

an Attaint doth lie for matters done in that Court. *Trin. 23. Car. B. r.* For there are no civil matters arising between party and party tryed there; but onely advice taken by them amongst themselves touching redressing of things amiss in, and keeping of Laws for the better governing of the Ci-

One ought to speak against the jurisdiction of the Court, by pleading to it, and not by speaking in Ar- rest of Judgment, *Mich. 23. Car. B. r.* for then it is late; for the party by pleading to issue hath allowed the jurisdiction, and the not having jurisdiction of the cause is no sufficient matter to arrest Judgment upon after al.

The Palace Court, is a Court in the Aire, and annexed to no Corporation, nor is beneficial to any society of men; and from the Tunnel of *White-hall*, and twelve miles from thence in compass is called the Palace Court. By Rolle Chief Justice. *Mich. 24. B. r.* Originally it had consuance only of matters in difference arising amongst the Kings Men- servants, but afterwards by corruption it extend- its power much further, to the grievance of the

The Statute of Jeofails doth extend to inferiour Courts, if the Errors in their proceedings cannot be mended by the comparing of their Papers or such other matters, for it is a beneficial Law, and be (therefore) largely expounded. *Pasc. 24. B. r.* For, *Omne Bonum est sui diffusum*,

A Court cannot be held by Custome, and by Let- ters Patents also, for if one have a Court by Custom, he Purchase Letters Patents, and holds the

Court by them, the Custom is extinguished. *M. 24. Car. B. r. By interrupting it, and holding the Court another authority.*

This Court hath authority to reform abuses in behaviour and carriages of all persons whatsoever throughout all England. *Hill. 1649. Feb. 9. And upon good reason for the civil and orderly demeanour of men in their ordinary conversation, which tend very much to the maintenance of the public Peace, with which this Court is principally intrusted with.*

The Parliament cannot take away the jurisdiction of this Court, without words in the Negative, that it shall not do thus or thus. *10. Feb. 1650. For if it only say, it shall do so, or so, the Court may do what is enjoined, and also what it might have done before, for here is no restraint.*

This Court is not to be open more than five dayes after the Term for Demurrers and Pleas, and but three dayes for Issues. *Trin. 1651. For that is time enough to dispatch such business.*

All Courts of Record are originally the King's. *Mich. 1651. B. S. And derived from him as the Fountain of all Justice.*

### Corporation.

If a Corporation do become so poor, that it is unable to defray the publick charges, which are incident unto it as it is a Corporation; it is fit that the Corporation be seized into the hands of the King. *21. Car. For the Corporation becomes uselesse and dishonourable to the Realm.*

If a Corporation doth neglect to elect such Officers as they ought to elect by their Charter, or if they make a false election not warranted by their Charter; this is a forfeiture of their Corporation. *Hill. 22. Car. B. r. For the Charter doth imply conditions in Law for them to perform, and not performing them, the Charter is forfeited.*

The Corporation of the City of London is to answer for all particular misdemeanours which are committed within any of the Courts of Justice within the City; and for all other general misdemeanours committed within the City. *Trin. 22. Car. B. r. So I conceive it is of all other Corporations; if it should be otherwise, the intent of their Charter which is for the good government of the City, would prove pernicious and destructive to the Realm.*

A Body Politick is a creature of the King, created by Letters Patents. *Hill. 22. Car. B. r. For though a Corporation may be by prescription, yet it shall be intended, that such a Corporation did (originally) derive its authority by grant from the King. For the King is the head of the Common-wealth, and all the Common-wealth in respect of him is but as one Corporation, and all other Corporations are but as limbs of a greater body.*

*Costs and Charges.*

No Costs ought to be paid for the putting off of a trial, where no fault was in the party against whom it is moved for Costs. For Costs are only to be paid by such persons which by their occasion have caused the other party to have been at extraordinary charges.

An

An Attachment lies against the party that refuses to pay Costs, which are taxed by the Master of the Office. 21. Car. B. r. According to the Rule of the Court. For it is a contempt to the Court, not to obey the Court's proceedings used there.

*Trin. 1657* by *Glyn. Chief Justice*, If a reference made to the *Secondary*, and he makes his report ; if either of the parties being not satisfied obey not a second reference, and the second report be made also, if the first was against him, the Court will award extraordinary costs against him for his vexation and delay.

If a Juror be withdrawn (upon a tryal) by the consent of the Plaintiff and Defendant, they shall pay the costs of the Jury equally between them. *Trin. 22. Car. B. r.* For if one of the parties (alone) should pay the Costs, upon bringing the Issue (again) to be tryed by the same Jury, as the course is so to do, it would be a sufficient matter for him that did not join in paying the costs, to challenge the Jury for favour to him that did & pay the costs. *Trin. 22. Car. B. r.* In regard of money received of one party only, which may move them to favour that party more than the other from whom they received nothing.

If upon a tryal, the Plaintiff be forced to be nonsuited, because his witnesses did not appear, he may in his Action recover his costs expended against his witnesses that do not appear. *Mich. 22. Car. B. r.* By the Statute of 5. Eliz. C. 9. & 29. Eliz. C. 5.

It is at the Election of the Defendant, if the Plaintiff do amend his Declaration, either to accept of costs and to plead, or else to refuse costs and to Imparle unto the next Term and not to plead. *Mich. 22. Car. B. r.* The Defendant upon such amendment

ent is to have costs, because thereby he may be caused  
take new advice of Councel what to plead, and then  
must plead, and he may Imparle, because by the a-  
endment it may be, time may be required for him to ad-  
se what to plead.

The taxing of Costs is the Act of the Court, al-  
ough they be taxed by the Secondary of the Office.  
Mich. 22. Car. B. r. For the Secondary is but the Officer  
the Court, and an instrument employed by the Court for  
ch purposes, and therefore the Court may alter the costs  
axed if they see cause, but in ordinary cases they use not  
do it.

And the Case of *Style and Atwood. Pasc. 1656. B.S.*  
pon a motion made to moderate costs taxed by  
erne the Secondary, *Glyn Chief Justice* said, That he  
ad sometimes moved to encrease costs, and some-  
mes to diminish costs taxed by the Officer of the  
ourt, but could never have his motion granted, and  
erefore would make no Rule here.

Costs more than ordinary ought not to be Taxed  
until the Attorneys on both sides be heard for their  
lyents before the Secondary. *Mich. 22. Car. B. r.*  
except it be where either of the Attorneys doth neg-  
et to appear before the Secondary, having no-  
ce thereof; and there it shall be presumed he  
th nothing to say for his Clyent in mitigation of  
B. costs.

If an Endictment, taken in any County, be remo-  
ed by *Certiorary* into the Kings Bench; and the  
ourt be moved, that it may be sent back again into  
e County where it was taken, and if the Court  
upon good cause shewed) do order it accordingly;  
shall be removed back again, at his costs who de-  
red it to be removed. *Mich. 22. Car. B. r.* For it  
shall



*shall be intended, that the removing of it is for his benefit and ease ; and therefore it is reason he should bear the charge.*

When upon a tryal the Plaintiff becomes non-suit the Defendant must pay the Jury their Costs. *M. 22. Car. B. r. For it is intended he receiveth benefit by the non-suit. Qui sentit commodum sentire debet onus.*

If there be any such fault in the entering of a special verdict, so that it must be amended, the Plaintiff or Defendant, who was the occasion of making the fault, must pay the Costs for the amending it. *Mich. 22. Car. B. r. if it be such a fault that Costs must be expended to amend it ; for it is not reason that the other party should be for his error.*

If a tryal at the Bar be put off in favour of the Plaintiff or the Defendant, and the party that was not the cause of putting it off, be compelled by putting it off to keep his witnesses in Town, that caused the tryal to be put off, shall pay such charges for keeping them in Town, as shall be taxed by the Secondary. *Hill. 22. Car. B. r. For he is in such cases to be Moderator betwixt both parties, that things may indifferently be carried betwixt them.*

If one will give leave to another to sue in his Name, he that grants the leave shall pay the Costs of the suit. *Hill. 22. Car. B. r. For he is the person on record, of whom the Law takes notice of, and the Court takes no notice of the private agreement betwixt the parties ; but intends that the party whose name is used in the suit is the party that is to gain or lose by it.*

Costs are not to be allowed for unreasonable

us, but only for such as the party was necessarily put unto by the course of the Court. 22. Car. r. *For the Law as it will not do unreasonable things, so neither will it countenance those which do*

Arbitrators are to make the Writings touching their arbitrimēt, at their own proper Costs; and ought not to award, that the parties that submitted the award, shall pay for them. *Pase. 23. Car. r. For this is no part of the submission, but a charge that ariseth after it, and which the Arbitrators have taken on themselves.*

Where the Judges of the Court do desire to have books of the Cause depending before them, to be added of the matter in Law the better, by considering the pleadings; the Plaintiff and the Defendant ought to joyn in the Costs, for the copying of the books to be delivered to them. *Trin. 23. Car. B. r. For they are equally concerned in the Cause depending, and therefore it is reasonable they should be at an equal charge bringing it to a conclusion.*

It is the course of the Court, to refer the taxing of the Costs to the Secondary of the Office, and not to make any special rules for such matters. *Mich. 23. Car. r. Viz. In ordinary cases, but in extraordinary the Court will sometimes make a rule for it.*

No Costs are to be allowed upon a Repleader. *Mich. 23. Car. B. r. For both the parties were in fault, suffer such an insufficient issue to be joyned, and neither ought to have costs of the other.*

Also where the Defendant demurrs to the Plaintiff's Declaration, and the demurr is adjudged good, the Defendant shall not be allowed his Costs, because it is out of the Statute. *20th 21st 22nd 23rd 24th 25th 26th 27th 28th 29th 30th 31st 32nd 33rd 34th 35th 36th 37th 38th 39th 40th 41st 42nd 43rd 44th 45th 46th 47th 48th 49th 50th 51st 52nd 53rd 54th 55th 56th 57th 58th 59th 60th 61st 62nd 63rd 64th 65th 66th 67th 68th 69th 70th 71st 72nd 73rd 74th 75th 76th 77th 78th 79th 80th 81st 82nd 83rd 84th 85th 86th 87th 88th 89th 90th 91st 92nd 93rd 94th 95th 96th 97th 98th 99th 100th*

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It is not necessary that the Jury should give costs but they may leave it to the Court to do it. *Mich. B. r. For the Court is best able to judge what costs are to be given.*

Upon a Judgment upon a *Nihil dicit* in debt in Common Pleas, that Court will give costs and damages generally. *Trin. 24. Car. B. r.*

If there be a special Verdict found in a *Replevin*, costs and damages shall be given, either against the replevyer, or against the avowant, as the issue shall be found for, or against them. *Pasc. 24. Car. B. r. Upon Judgment given upon Argument upon matter in Law.*

The Court will not order any thing concerning encreasing or mitigation of costs, but the parties to attend the Secondary in it, and to abide by his order. *13. Nov. 1650. B. S. Except it be in extraordinary cases. And there the Court is to be moved, and is to rectify the Secondary, for he is not to vary from the ordinary Rules of proceeding without the express direction and order of the Court.*

If a Juror appear upon a tryal which is to be at the barr, and the Jury is adjourned, and he doth not again appear, at the day of adjournment he shall have no Charges allowed him for his former appearance. *2. May. 1651. B. S. For his former appearance was to no purpose, nor is beneficial to any party, nor the end for which he was summoned satisfied.*

By Glyn Chief Justice, *Pasc. 1658.* It was said, That it is the course of Common Pleas to make the Lessor of the Plaintiff in an Action of Trespass and Ejectionment to pay the costs of the Suite, if it go against the Plaintiff, and therefore he made it a Rule that

shou

ould be so in this Court, which is now generally served. *Mich. 13. Car. 2.*

*Chancery.*

A Master of the Chancery, hath not power to take Oath, but in a Cause which is depending in the Court of Chancery. *21. Car. B. r. If he do it, it is tuncoram non Judice, and is of no validity, and it hath been so adjudged.*

The Chancery is not a fixt Court ; neither in respect of the place where it sits, nor of the time when it may sit, for they may sit out of the Term, and in what place they please. *12. Nov. 1650. B. S. By Rolfe Chief Justice. Though generally they do it not, but sit principally in Term time, and at Westminster.*

*Capias.*

There must be 7. daies exclusive betwixt the Issue and Return of every Warrant to warrant a Facias against Bail, and that the Capias ought to be delivered to the Sheriff 4. daies before the return is past. *Per Magistrum Livesay, Pasc. 21. Car. Reg.*

A Capias, duely sued out, may be filed afterwards. *Car. B. r. For the filing of it is not of the essence of the writ, but that the Court, and the Defendant may be taken notice of it.*

*Challenge.*

When the Jury appear at a Tryal, before the Secondary calls them particularly by Name upon the panel,

panel, to be sworn : he bids the Plaintiff and Defendant, to attend their Challenges. 21. Car. B. r. *afterwards it is too late to challenge, for then they are be sworn.*

It is not a sufficient cause to challenge a Juror, cause he had delivered his opinion touching the of the Land in question. *Pasc. 23. Car. B. r. 2 men ; for it seems he is not indifferent, yet his opinion may be altered upon the having of evidence, whereby he may be better informed of the matter of fact than he was before.*

Upon a tryal at the Bar betwixt *Harison* and *Pasc. 1657. B. S.* a Juror was challenged for the Plaintiff, and the Defendants Council consented *quod tunc*, and after the Plaintiff would have waived his Challenge, and it was questioned whether he should do it, though it was before all the rest of the Jurors were called upon the panel. But at length it was permitted, it not being much insisted upon : yet in the Case of *Arnold* and *Bell* the same Term was said, It could not be done, except the parties consent unto it. *Vide Mon. Note-Book. 14.*

If one take a principal Challenge against a Juror he cannot (afterwards) Challenge that Juror for his favour, and waive his former challenge. *Pasc. 23. Car. B. r. For he shall not waive a greater challenge to take a less.*

If the Defendant do not appear at the Tryal when he is called, he loseth his challenge to the Jurors, although he do afterwards appear. *Mich. 16. Car. B. r. For though he appear not, the Jury is called and sworn to try the Issue, and therefore if he appear not at first, it will be afterwards too late to take a challenge.*

of one Challenge a Juror, and do not make his challenge good, and after the Jury is adjourned; he shall challenge that Juror again at another day, except it be for some matter which is hapned since the adjournment. *Mich. 23. Car. B. r. For a Juror can be but once challenged.*

Q. If one challenge a Juror, he cannot (afterwards) oblige him to be sworn, if the Secondary have entered the challenge. *Pasc. 24. Car. B. r. Q. Whether he may have him sworn if the challenge be not entered: it seems he may waive his challenge and have him sworn, for his challenge is not upon Record.*

Q. Is a good Challenge against a Juror, to say that he was a Juror in a former tryal for the same Land in question, and upon the same title, though the tryal was between other parties. *Mich. 24. Car. B. r. For it is probable he will maintain his former Verdict, though the offence be different. Q.*

When the Array, (that is the whole Jury) is challenged, the Counsel of the party that makes the challenge, must read his challenge in *French*: and when he hath so read it, it is to be delivered to the Secretary, who is to read it in *Latin*. *6. Nov. 1650. Which was then done in a challenge for want of 23. Jurors.*

After the fore-man of the Jury is sworn, the Array cannot be challenged. *6. Nov. 1650. B. S. For then is the Array set: for, to challenge the Array, is to challenge the Jury, which cannot be done after one of them is sworn.*

A Challenge to a Jury for favour is not accounted a principal challenge. For favour is an uncertain matter, and not to be relied on.



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If some of the Jury be challenged for favour, shall be tryed by the rest of the Jury their Con-  
nions, upon their Oaths, whether they be indiffe-  
rent to try the matter in question, or not : without going  
from the Barr, when they have heard all the evi-  
dence that is given against them by the Counsel of  
party that takes the Challenge. 1655. B. S.

In a Case tryed at the Barr, between the Earl of  
Leicester and the Lady Anne Holborne, a Juror  
was Challenged, because he was returned by the Name  
Matthew, whereas (in truth) his Name was Mark  
though he was (also) called Matthew, as he affirmed  
being examined upon a *voire dire*, to say what  
Name was; and upon this challenge the Juror was  
drawn, and the Jury could not be taken for want of  
him, but a *tales* was granted. For, *Non constat*  
*sona*.

It is neither a principal Challenge, nor a Challenge  
for favour, to say that the Juror Challenged, was  
supernumerary Juror in a former Jury returned  
for the same parties, in a Cause betwixt them, and  
received mony for his charges of the party for whom  
the Verdict passed. By Glyn Chief Justice, because  
he was not sworn to try the Issue, and so no Jury man,  
but a meer stranger.

### *Certiorary.*

No Certiorary ought to be made to remove  
Judgment out of an inferiour Court, at the petition  
of the Plaintiff in the Action, whereby to compel  
him to have Execution out of this Court for the  
the Judgment of an inferiour Jurisdiction. Per  
Livesay, & alios &c. P. 21. Car. 2. Reg.

It is not necessary to have a Judges hand to a Writ *Certiorari*, to certifie a Writ of Error. 21. B. r. For it is *Authenick it self* and ought to be ordered.

A *Certiorari* to remove an Endictment, doth lye the Course of the Court, without moving the Court for it. *Mich. 22. Car. B. r. Q. whether it hold in cases.*

After a Writ of Error is brought, there must be a Writ of *Certiorari* directed to the Court where the Judgment was given, for reversing whereof, the Writ of Error is brought, to certifie the record into this Court. *Mich. 22. Car. B. r. Viz. a Transcript thereof;* the Record it self is not removed, although by allying of the *Certiorari*, the hands of the Court are so far from proceeding any further upon it, till the Errors are examined, and the Judgment affirmed, in case there be Error in it.

Note, a *Certiorari* is never sued out after a Writ of Error but where diminution is alledged, for in the Writ of Error is contained a Command to certifie the record and process, *cum omnibus ea tangent* notwithstanding what is said before.

*Glyn Chief Justice* in the Case of one *Gassock*, 56. B. S. the Kings Bench Court may grant a *Certiorari*, and remove a cause before Judgment out of an inferiour Court, though the cause cannot be determined here, if the inferiour Court have no jurisdiction of the Cause, or do not proceed therein according to the rules of the Common Law, but if an inferiour Court have jurisdiction and this Court hath no *Certiorari* ought to be granted. For it would be to suppose to grant it.

A *Certiorari* to remove an Endiſtment, is although it do bear date before the taking of the Endiſtment which is to be removed by *Certiorari*. Mich. 22. Car. B. r. For the date is not material, and it may be granted to remove ſequent Endiſtment, as well as an Endiſtment preceding the *Certiorari*.

When a certificate of a Record is made out of an inferiour Court, they ought to make the certificate ſo that they will ſtand to it at their peril, and it cannot afterwards amended; and if the Record be not certified, there lies an Action on the Caſe againſt the party that made the certificate. Hill. 22. Car. B. r. *A Writ of diminution is not grantable to an inferiour Court.*  
*2 What remedy the party that brings the Writ ſhall have if an inferiour Court do not return the record.*

This Court, will upon motion, grant a *Certiorari* to remove a Judgment given to an inferiour Court, with the intent, that the Plaintiff may have a *Scire Facias* againſt the Defendant, to ſhew cauſe, why he ſhould not have execution upon his judgement. Hill. 22. Car. B. r. *This was done in the Caſe of Roſe againſt Knight, to remove a judgment given in a church, part of one of the Cinque Ports in the County of Kent. This is done in caſe the ordinary way of taking execution be hindered in the inferiour Court, where they reſuſe to grant out execution; if the Court is the ſupreme Court of Juſtice to appoint a jury in extraordinary Caſes; but there is a Statute made lately, that forbids any ſuch *Certiorari* to be granted.*

The Juſtices of Aſſize may certify to this Court, that a jury do find a Verdict againſt the evidence of them. Paſc. 23. Car. B. r. *That Judgment*

edily entred upon such a Verdict, for such Verdicts are  
avoured in Law.

was doubted, whether a Certiorari do lie to the  
ue Ports. Pasc. 23. Car. B. r. Notwithstanding,  
is done in the Case of Rooke and Knight before

For if it should ordinarily be granted, it would  
lessen their priviledges, and put those that  
within such jurisdictions to extraordinary trouble  
bargo.

one party pray a Certiorari, and have it granted,  
ther party cannot have another Certiorari. Pasc.  
Car. B. r. viz. For the same thing; for the second Cer-  
ri would be to no purpose, and the Law will not have  
s done in vain.

there be cause to certifie the Court touching a  
me used in the City of London, this certificate  
t to be made in writing, but the Recorder of  
on is to certifie the Custom to the Court, ore  
or by word of mouth; for the Recorder is in-  
ted to be best Conusant of the Custom, and he is  
intended to be alwaies in London; and therefore  
or the greater dignity of this Court, that he at-  
in person to give satisfaction herein, than to  
a certificate, which will also require witness  
ove it, and so more trouble and delay in it. Trin.  
Car. B. r. But not if the Custom doth concern the  
Major particularly. By Rolle Chief Justice. 2.  
m differentie.

then Justices have authority given them by a  
te within a Liberty; a Certiorari lyes to them  
Liberty be not excepted. Hill. 23. Car. B. r.  
a Certiorari being grantable at the Common  
is of force ar well within Liberties as without,

except where a liberty is exempted by some  
tute.

A *Certiorari* ought to be granted upon a matter  
Law only, and not upon a matter of fact. *Past.*  
*Car. B. r.* For matters of Law only are disputable by  
Court, and matters of fact by *Juries*.

Out of an inferiour Court, the original Record  
ought to be certified into this Court upon a Writ  
Error brought to reverse their judgement : but the  
Common Pleas do only certify a transcript of the  
Record before them. *Trin. 24 Car. B. r. 2. rationem*  
*ferentie.*

The Prothonotaries of the Common Pleas will  
make a certificate of any matter before them in  
this Court, without a Rule of this Court to enjoin  
them. *Trin. 24. Car. B. r.* That is, they will not  
upon the request of the party concerned ; because  
such a request, they cannot be ascertained whether  
Court desires such a certificate, for the Court speaks  
by its rules.

A *Certiorari* ought to be directed to the *Custos*  
*vium*, and to be returned by him, and is not to be re-  
turned to his deputy or returned by him. *Mich. 24.*  
*B. r.* For he is the Officer the Law takes notice of, and  
his deputy.

A *Certiorari* doth not lye to remove a Cause  
a verdict is given in it. *Mich. 24. Car. B. r.* For  
the Cause is determined, and so in vain to remove  
it.

If a *Certiorari* to certify a Record, be (by  
misshap) so torn or defaced, that the Record can-  
not be perfectly certified by it, the party may have  
his *Certiorari* *Mich. 24. Car. B. r.* Upon a motion  
Court, because he had no fruit of the first, and so in  
one as if he had not any.

*Certiorari* may be granted to remove an Act of Common Council of the City of London, if the Act made against the Law. 6. Miii. 1650. B.S. For the Common Law is the birthright of the people, and the due proceeding thereof is not to be interrupted by colour of a singular custome or priviledge.

The Court may grant a new *Certiorari*, to remove record before them upon a Writ of Error brought, that in *nullo est erratum* is pleaded; if it be *ad in-  
andam conscientiam*, in affirmance of the Judge-  
ment: but at the prayer of the party that brings the  
Writ of Error, and after in *nullo est erratum* pleaded,  
the Court will not do it. Trin. 1651. B.r. For judgments are  
sacred in Law, and are to be supported, as much as ju-  
stice will permit.

By Glyn Chief Justice Pasc. 1658. It was said that  
Plaintiff in a Writ of Error, may have a new  
Writ of Error to remove the Record after that the  
Record is certified, and the Defendant hath pleaded  
*nullo est erratum*, for it may be the right Record is  
removed. Nota.

By Rolfe Chief Justice said, That he did not use to grant  
*Certiorari* to remove an Endicement, but where the  
party that prays it, doth shew good cause why it should be  
removed, viz. that there cannot be an indifferent tryal  
in the County where the Endicement was found. And  
where he doth grant it, he orders that it shall be tryed  
at the next Term following. 24. Car. B. r. For En-  
dicements generally concern the Common-Wealth, and  
therefore delay is not to be admitted in the prosecution  
of them.

*Certiorari* ought not to be granted to remove  
Endicement, after the party endicted hath tra-  
versed and pleaded to the Endicement. By Rolfe.



*Mich. 1654. B. r. For by so doing he al-  
that he is contented it shall be tryed where it was  
ferred.*

A *Certiorari* to remove an Endictment, ought  
to be made by any of the Clerks in the Crown Office  
without moving the Judges in it, and obtaining  
Judges hand to it, and a Warrant from the Master  
of the Crown Office. For the granting of a *Certiorari*  
the Act of the Court, and is to be granted or denied, as  
shall see cause, and it is not a matter of course to grant

### *Customes.*

The Customs of London are confirmed by Magna  
Charta. C. 9. viz. all such as are not repugnant to  
Common Law.

Customs which are unreasonable, are not good  
nor to be allowed. *Trin. 22. Car. B. r. For the  
Common Law is grounded upon reason, and allows  
unreasonable things.*

Any Custom which may be intended to have  
a lawful beginning is a good custom. *11. H. 7.  
Mich. 24. Car. B. r. Else not for continuance of time  
make malum in se to be good.*

Any thing which may be good and lawful to be  
done, which had its original from the consent or  
agreement made betwixt parties, may be good and  
warrantable to be done by vertue of a Custom. *Mich. 23. Car. B. r. Although some particular  
sours may be prejudiced thereby ; for, consensus  
errorem.*

By the Custom of London, an Action upon the  
Case doth lye against one for calling a woman a  
Whore, so is the common practice now, and so is  
like

also likewise in the Court of the Burrough of *Southwark*, where they alledge a Custom specially for whipping and carting of all Whores, which makes it Actionable: it lyeth likewise for a Lodger, for she comes within the Customs, which reacheth to all the Inhabitants, *quod nota.* *Hill. 22. Car. B. r.* But she must be a *habitant of London* for by the Law it lies not.

The Customs of the Universities are confirmed by Act of Parliament. *Pasc. 23. Car. B. r.*

The Customes of *London*, if there be a question in this Court, whether there be such Customs or not, are to be certified by the mouth of the Recorder. *Pasc. 23. Car. B. r.* As intended to have consufance of them, as being *os Civitatis*.

By a Custom which they have in the Town of *Wimb-hampton*, if a bastard child be found within the Town, and the father of it cannot be discovered, he that comes next into the Town, after the Child was found, must keep the Child. *Mich. 24. Car. B. r.* It may be that they of the Town did time out of mind agree amongst themselves that it should be so, and therefore it shall not be adjudged to be an unreasonable Custom, although it seems to be a strange Custom.

By a Custom of the City of *Bristol*, an Action brought against one upon a bare promise of another party, that he would pay the money, or upon a *concessit solvere*, is maintainable there: and it is by the Custom of *London*. *31. Jan. 1649.* S. This may be thought reasonable there in regard to the ready way used in bargaining and commercing one with another.

It two persons be found in arrear upon an Action of *Warrant* grounded upon the Custom of Merchants, any

any one of them may be charged to pay the whole sum that both of them were found to be in arrears upon the accompt : and this is, by the Custom of Merchants. 26. Jan. 1650. B.S. Viz. *two persons to drive a joynt trade betwixt them ; for it is intended that each of them answerable in way of trade for what Partner shall do.*

If there be a tryal to be had, whether there be such a Custom as is pretended within the City of London or not, this issue cannot be tryed in Kings Bench, but it must be tryed in London the Hustings. 27. Jan. 1650. B. S. *For this Court cannot so well take notice of the Customs, as they may and ought themselves.*

By a Custom used at Sea, the goods in a ship which is taken as prize, ought not to be taken out of the ship, before the ship so taken be condemned for prize in the Court of the Admiralty. By Reason of the Chief Justice, in the Case betwixt Lever and Smith. Mich. 1654. B. S. *For before the ship be condemned, it appears not judicially that the goods are prize goods, therefore they be brought in as a prize.*

#### *Compulsion.*

None shall be compelled by Law, to shew or declare any thing, of which by common intelligence he cannot have knowledge. 38. H. 6. Mich. 22. Car. B. r. *For the Law will not supply the want of reign intendments, and remote possibilities for the benefit of any person.*

*Counsell and Counsellour.*

A Counsellour ought not to set his hand to a frivolous Plea or Demurrer, to delay a tryal. *Mich. 22. Car. r.* For it is not fair practice, and it doth argue ignorance of the law, and a foul practice in him that doth it.

After the Court hath delivered their opinions of the matter in Law depending before them, the Counsellor at the barr ought not to urge any thing more for the Clyent in that cause. *Mich. 22. Car. B. r.* For it is unlawful, not to acquiesce in the judgement of the Court, but to be unsatisfied therewith.

One that is endicted for felony, may have Counsel assigned him to speak in matters in Law, which may arise upon the Endictment. *Pasc. 23. Car. B. r.* But not of matters of fact, for of those he shall not be presumed to be ignorant of, though he may be of matters in Law.

One cannot have Counsel assigned by the Court upon an Endictment *in forma pauperis*. *Pasc. 23. Car. Mich. 1649. B. r.* But Counsel must be assigned to him by warrant under the hand and seal of the Lord Chief Justice, that the Counsel may have it in his hand to shew to the Court if they require.

Where Counsel is Assigned to one that is indicted for Felony, the Counsel Assigned ought to be entered upon Record. *Pasc. 24. Car. B. r.* Because it is a publique Act of the Court in relation to the Common-Wealth, as well as to the party.

*County.*

Some part of the County of Chester is not within the County Palatine of Chester. *Mich. 22. Car. B. r. what part.*

Where a River doth run betwixt two severall Counties, there one half of the River belongs to one County, and the other half of it belongs to the other County. *Pasc. 23. Car. B. r. viz. From the shoar to the middest of the River, as far as the River extends in length upon the County. & whether this be generally true without exception.*

*Constable.*

If one that is elected to the Office of a Constable do refuse to take his Oath to serve in that Office, this Court may send forth a Writ unto him, to compel him to do it. *Mich. 22. Car. B. r. For in extraordinary cases which concern the peace and government of the Nation, this Court is to enforce obedience where ordinary means fail, as being the supreme Court.*

If a Court-Leet do not elect a Constable where they ought to elect one, or do not give him his Oath to execute his Office as they ought to do, the Quarter Sessions in the County where the Leet lies may do so. *Mich. 22. Car. B. r. For the electing and establishing Officers is for the peace and safety of the County, which they ought to be elected, which peace and safety is committed to the Justices of peace there in their Quarter Sessions.*

A Constable that is a Constable in one Town, &

not execute the Office of a Constable in another town. *Pasc. 24. Car. B. r.* For every Constable hath his particular precinct, through which his authority extends, out of which he is not to act.

*Commission and Commissioners.*

Commissions of the Peace, &c. do cease by the coming of the Kings Bench into that County where they are, if it be proclaimed, else not. *Commis. 101. 27. Ass. Pl. I. 75. N. B. 242.*

The Commissioners of the Statute of Bankrupt have not authority by the Statute of 1. Jac. to transfer any other Action to any person in order to the recovery of any of the goods of the Bankrupt, but only such Actions as the Bankrupt himself might have had to recover them, if he had not been found a bankrupt. *Mich. 22. Car. B. r.* For he comes but in the place of the Bankrupt as to the recovery of the estate.

The King may by his Commission make one or more Deputy Escheators, to find an Office after the death of a noble man, or for some other special cause. *Pasc. 24. Car. B. r.* For such offices are but offices of Enquest, and may be found by special Commissions.

A Justice of Assize may have a special Commission to ride the Circuit alone, but if his Commission be general and according to the Statute, he is to have an Associat joyned with him in the Commission. *Trin. 1. Car. B. r.* For in this case, the King may dispense with the Statute, not being prohibited by the Statute to do it.



## Sessions.

If a Court-Leet do not choose a Constable, or not give him his Oath to execute his Office, the Quarter Sessions of the County where the Leet is, may do so. *Mich. 22. Car. B. r. Antea tit. Constable.*

If one speak of a thing to be done at the General Sessions of the Peace, it shall be intended to be intended that it was done at the Quarter Sessions. *Trin. 24. Car. B. r. For that is the most General Sessions, being held at the whole body of the County.*

## Commitment.

None shall be committed for a contempt done at the Court, if the contempt do not clearly appear at the Court. *Mich. 22. Car. B. r. So tender is the Law of inflicting punishment upon any without an apparent cause.*

Every Commitment to the Goal, ought to be made by Warrant under the hand and seal of him that commits the party, and the cause why the party is committed ought to be expressed in the Warrant. *Pasc. 23. Car. B. r. This is true of Commitments made by Justices of the Peace in the Country ; but this Court may commit by Parol, and without the Cause in the Commitment.*

## Contempt.

One may be committed for a Contempt done at the Court, but the matter of the Contempt must be certain and not doubtful. *Mich. 22. Car. B. r.*

## the Accomplish'd Atturney. 111

or else the party may perchance be wrongfully committed, which the Court will be cautious not to do. An Attachment lies against one for a Contempt done to the Court. *Hill. 22. Car. B. r.* To bring him in to answer the Contempt, and in some cases the Court will command a Tipstaff to bring the party in.

If the Court make a Rule in an Action of Trespass and Ejectment, that the Defendant in the Action shall confess the Lease, Entry, and Ouster; and yet the Tryal the Defendant will not do it; the Plaintiff must proceed notwithstanding in his Tryal; but he may also proceed in this Court against the Defendant for his Contempt in not obeying the Rule of the Court. *Pasc. 24. Car. B. r.* By taking of an attachment against him for disobeying the Rule of the Court. 2.

If one take out an Execution upon a Judgment after that a Writ of Error is brought in this Court to reverse the Judgment, and after the Writ of Error is allowed in the Court where the Judgment was given; this is a Contempt to this Court. *Trin. Car. B. r.* But it is no Contempt if the Roll be not marked, or notice given to the party of the Writ of Error brought. *Mich. 1649. B. r.* Because he is not bound to take notice of the bringing of the Writ of Error.

After a Writ of Error shewn to the Adverse Atturney, the Atturney which brings the Writ hath four dayes time to allow, and after he hath allowed, he hath four daies time to put in good Bail.

The Plaintiffs Atturney is not bound to search the record, whether a Writ of Error be brought or not, but may take out Execution upon the Judgment given for his Clyent, if there be no *Superfedeas* taken

ta ken forth, or have not notice given him of the  
of Error. *Trin. 24. Car. B. r. For a Writ of Error is  
extraordinary thing, and seldom brought, and there-  
fore the Attorney is not to take notice of it without  
tice.*

### *Condition.*

There is difference between a Condition which  
annexed to an Estate subsequent, and a limitation  
subsequent, which is annexed to an Estate presently  
vested. *Hill. 22. Car. B. r. The difference is in respect  
their different operations upon the Estate.*

### *Causes.*

The Clerk of the Papers is to enter the Causes  
which do depend in Court in his Book in the Office  
and out of it he ought to write several papers, one  
for every Judge in the Court of those causes con-  
cerning which any thing is to be spoken in Court  
next day, and to send the Papers to the Judges sepa-  
rally at five a Clock in the Evening, before the Causes  
are to be spoken unto. *Hill. 22. Car. B. r. That the Judges  
may have time to advise of them.*

### *Confirmation.*

A confirmation of Letters Patents, which are  
in respect that they are against the Law, is a  
Confirmation, although it be done by Act of Parlia-  
ment; but if they were not against the Law but  
only want Law to Authorize them, if they be after-  
wards Confirmed by Act of Parliament, the

tion is good: *Hill. 22. Car. B. r.* To confirm a thing give more strength and power to a thing which hath a weak and imperfect being, yet hath a being tiel quel; to Confirm a thing which is void or unl in it self, is Confirm a non ens, and can have no operation, and in account of the Law are things acted contrary to

*Chattel.*

One may by a conveyance raise a Chattel which be determinable, as well as it may be done last Will and Testament. *Trin. 23. Car. B. r.* what may be done by a Will, may be done by a conveyance, which is of a greater force in many cases a Will is.

*Copyhold and Copyholder.*

Copyholder doth forfeit his Copyhold by cut-down of the Timber growing upon the Lands ing to the Copyhold Tenement. *Trin. 23. Car.* Except it be for reparations of the Copyhold: and for the preservation of the Copyhold, which else be destroyed, and the Lord thereby prejudiced by want, who is upon the matter but Tenant for life, by Law is not to do wast.

Whether the King shall have a Copyhold, which is granted to one in trust for an Alien. *Hill. 23. Car.*

It seems he shall. This was argued about some time, but no judgment given then or since to my advantage.

As a forfeiture of the Copyhold, for the Copyholder to refuse to pay his fine, if it be a fine certain,

or refuse to appear at his Lords Court, and to do service there; for there is a Condition in Law imposed in every Copyhold Estate, that the Copyholder must pay his fine and do his service, upon pain of forfeiture for not doing it. *Trin. 24. Car. B. r. But if he refuse to pay a fine incertain after it is set, it is no forfeiture for the fine may be unreasonable, and the Court is to be the judge of that.*

A Surrender of a Copyhold to an use, makes not one a Copyholder, as to a purchase, but as to descent it is otherwise. *5. Feb. Hill. 1644. B. S. Q.*

If a Copyholder for life cut down Trees, the Lord may carry them away. *6. Nov. 1650. B. S. For when they were standing they were the Lords, and the cutting of them down, gives the Copyholder no interest in them,*

A Copyhold estate cannot be surrendered to another by an Attorney without Deed, but one may be admitted to a Copyhold estate by Attorney without Deed. *2. Ap. 1650. B. S. For there is difference between the passing of an estate, and the receiving of an estate passed.*

#### *Contract.*

No usurious Contract can be grounded upon a direct bargain which may either be accepted or refused by the party. *Hill 21. Car. B. r. For it is not within the Statute, and the party cannot be prejudiced but by his own consent.*

If a Contract be usurious, and made so that the Statute may be avoided, yet it is a corrupt bargain and shall be adjudged to be within the Statute. *Hill 21. Car. B. r. For it shall be within the equity of the Statute.*

it, though it be not within the words; for the Statute  
 ing a beneficial Law for the Common-wealth, shall be  
 ended to equity, especially where there appears to be  
 tilty used to avoid the Statute and the penalty of

An absolute Contract may be dissolved by Parol  
 here be good consideration for the dissolving of it.  
 c. 24. Car. B. r. Else not, because it is intended that  
 was made upon a good consideration, and therefore it is  
 reasonable it should be avoided without a conside-  
 ration.

Every Contract doth imply in it self an Assumpsit  
 Law for to perform the Contract. 4. Feb. Hill.  
 9. B. r. For a Contract would be to no pur-  
 if there were not a means to enforce it to be per-  
 formed.

I do promise to pay a Debt to I. S. which Debt  
 owing to I. S. by G. D. this is *nudum pactum* for  
 of a consideration; and if I do not pay it, yet  
 Action doth not lie against me for not paying it  
 according to my promise. 3. Feb. 1650. B. S. But if  
 I promise to pay it, if I. S. will forbear to sue G. D. for it  
 such a time, or such other like consideration, this is a  
 promise; for here is a good consideration, for this for-  
 bearance may be a prejudice to I. S. and a benefit to G. D.  
 also to him that makes the promise.

Covenant.

One do Covenant generally to levy a fine of  
 Lands, he that doth thus Covenant, is not  
 bound to go before Commissioners Authori-  
 zed by a *dedimus* to take this fine to acknowledge his  
 Covenant. Trin. 24. Car. B. r. For it shall be in-



tended he was to do it in the ordinary way, which is before Commissioners.

If a Lessee for years, Covenant expressly, to repair a house let unto him, and during his term, the house is burned down, he is tyed by the Law to repair or new build it, whether it be burnt by negligence or other waies. *Mich. 1649. B.S. For by his express Covenant he undertakes to undergo all casualties; but he is so tyed by a Covenant in Law.*

### *Consideration.*

One may sell his Freedom and Priviledge for a consideration. *Trim. 24. Car. B.r. But without a Consideration he cannot part with it so, but that he may recal his grant of it at his pleasure; for by the Consideration there is quid pro quo, and it is intended he hath a full recompense for his freedom, by reason of his own Contract.*

If a Deed of Feoffment be made to two or three Lands or Tenements, and no consideration is expressed in the Deed, for the making of the Deed; it shall be intended by the Law, that it was made to them in trust for the feoffor. *Mich. 24. Car. B.r. For it shall not be intended, he would part with his Land without a Consideration, and yet the Deed shall be construed to operate something, and also that which may seem reasonable.*

If there be a double Consideration for the grounding of a promise, for the breach whereof an Action is brought, though one of the Considerations be not good, yet if the other be good, and the promise broken, the Action will well lye upon that breach. *Trim. 51. B.S. For that one Consideration is enough to support the promise.*

*Comm.*

*Common and Commoner.*

Hoggs are not Commonable Cattel : It seems they are not Commonable by reason of the destruction they make in the Common by rooting, and of their unruliness in respect of other Beasts, *Pasc. 1650. S. Yet by consent of the Commoners amongst themselves, it is usual to put Hoggs upon Commons and pastures.* *quam tuum Coker 111. 122 \**

A Common which is of late times erected, must be erected by deed. 3. Nov. 1650. B. S. *Because it is a thing against the particular interest of meum and tuum, and therefore the Law will see it hath a good foundation warrant it.*

The Lord of the soile of the Common, may either surcharge or enclose an overplus of a Common, (that is) so much of it as is more than needful for the commoners to common upon, in regard of the largeness of the Common, and the small number of the commoners and of their stock. But if there be not such an overplus of Common, he cannot surcharge or enclose any part of the Common. 18. Apr. 1650.

*S. Nor can he erect a Warrein of Coneyes upon the Common; for this would be in prejudice of the Commoners, but where there is an overplus of Common, where the surcharging, or enclosure can be no prejudice to them.*

*Confession.*

If the Pläintiff, in an *Ejectione firme*, will not save the Tenant of the Land, against whom the Action is brought, harmless from all dammages that may befall

him, by reason of the Action brought against him the Court will suffer the Tenant to Confess the Action : but if he will save him harmless, the Court will not suffer him to do it. 12. Nov. 1650. B. For as its reason that the Tenant should not be prejudiced by the suit which concerns him not ; so neither its reason on the other side, that he should prejudice the Plaintiff, by doing of that which he receives no benefit by doing it ; and by such his doing hinder the bringing of the right of the parties concerned to a legal tryal.

## Copy.

If upon a tryal you will give part of a Copy of an Office in evidence to prove a Deed, which deed is to prove the parties title to the Land in question the Court gives it in evidence : If that part of the Office given in evidence, be not so much of the Office as doth in any way concern the Lands in question, the Court will not admit it to be given in evidence. 28. Apr. 1651. B. S. For though something in the Office may make for him who gives it in evidence, yet it may, if the Office be taken together make against him, and therefore the Court will have it all given in evidence, ad in quantum mandum conscientiam, and so satisfy the injury, or else no part of it shall be admitted in evidence.

The Jury upon a tryal at the Barr, may not be admitted to have any Copies of Deeds or other writings, which were given in evidence unto them, away with them from the Barr to consider of their Verdict which are not under seal. 28. Apr. 1651. B. S. But all Deeds or writings under seal and given in evidence

vidence they may have, but nothing which was not given in evidence may they have ; for this were to make new evidence which the Court heard not, which ought not to be, for the Court gives their direction to the Jury upon the evidence that is given in Court.

*Conveyance.*

A Conveyance made unto one by his reputed name, although he is not the same person in Law as he is reputed, yet is the Conveyance good : because it appears he was the same person in fact who was intended to take by the Conveyance, but if such a Conveyance be made to raise a use, then it is not good.

8. Apr. 1651. B. S. For a Conveyance to raise a use is usually made to a stranger, and not to cestuy que use, and therefore if it be uncertain, who is the cestuy que use, the conveyance is void for the uncertainty.

A Conveyance cannot be fraudulent in part of it, and good as to the rest. 30. Apr. 1650. B. S. For if it be fraudulent and void in part, it is void in all, for it cannot be divided ; for it is made and is to take effect, unto the whole.

If I Covenant to Convey Lands to another, I am bound to do it at my own charges : except it be otherwise agreed betwixt us. Trin. 1651. B. S. For he is to perform the whole Covenant at his peril, and the covenantee is not bound to be assisting unto him in perfecting thereof.

*Certificate.*

This Court will not make a Rule, for a Judge to take a Certificate to them of a matter done before them ;

him ; but if the Judge will do it voluntarily he will receive it. *For this Court cannot have consensual such private transactions of things.*

Clergie.

One Out-lawed for Felony was brought to the barr, and had his Clergy without purgation. *Lib. 120. Mich. 17 H.7. Ro. Inter placita Regis.*

Clarke.

By Rolle Chief Justice, no Clark ought to be admitted into the Office of the *Custos breviarum*, without the consent of the Lord Chief Justice first obtained : and those that are admitted, ought to be chosen out of the best of the Clarks in the Kings Bench Office. *165 For the Lord Chief Justice hath a Superintendent power over all the Offices and Officers belonging to this Court, for the better regulation of them in order to the ready administration of Justice.*

Departure.

**W**Hen the Plaintiff doth Reply in his Replication, a matter which is contrary to that which is admitted in his Declaration, this is a Departure from his Plea. *Mich. 24. Car. B. S. And is as much as to deny what he formerly admitted, which is to say and unsay, and is naught for the incertainty, because an issue cannot be joyned upon it.*

*Denison.*

An Alien that is made a Denison by the Kings Letters Patents, is thereby enabled to purchase lands, but he is not thereby enabled to inherit the lands of his ancestors as Heir at Law, but as a Purchaser he may enjoy Lands of his ancestors. *Mick. 2. Car. B. S.* But if he be Naturalized by Act of Parliament, he may inherit them as Heir at Law, as well as have them by purchase; for this doth restore him in blood, and makes him as a free-born English-man, and partaker of the Common Lawes of the Land.

*Delivery.*

It hath been the course to Deliver a Lease of Easement to the party to whom the Letter of Attorney is delivered, and for the Attorney, by vertue of his Letter of Attorney, to deliver possession of the land let by Lease upon his delivery of the Lease. *Pasc. 24. Car. B. r.* But this course is antiquated, except it be in some special Cases.

A Deed cannot be Delivered as an escrow to the party himself to whom the Deed is made. *Trin. 24. Car. B. r.* But it must be delivered to a stranger as an escrow, for so soon as it is Delivered to the party to whom it is made, it takes effect as a Deed, and cannot be an escrow; but when it is delivered as an escrow, it takes effect till it be Delivered over to the party to whom the Deed is made.



*Dower.*

A woman was not Dowable of Tithes, before Statute of 32. H. 8. 24. *Car. B. r.* For before that, few Tithes were in Lay-mens hands, or were compied a lay fee.

A woman is Dowable of a Common appendant but not of a Common in gross *Pasc. 24. Car. B. r.* Common appendant belongs to Lands and Tenements whereof she was endowable, and cannot be severed.

A woman may be endowed of the profits of an Office, or of a Fair, or of a Market. *Pasc. 24. Car. B. r.* Because it is an inheritance, and may be reduced to a certain sub modo.

Dower is favoured in Law, and as it is favoured in itself, so is the party that sues to recover her Dower favoured in her proceedings in Law to recover as much as in justice may be permitted. *Pasc. 24. Car. B. r.* For the Common Law doth extraordinarily favour and protect Widows and Orphans, as needing most help.

*Difference.*

There is a Difference between the Latin words *in dilate* and *immediate*, and it is more proper to direct a Writ to be returned *in dilate*, than to direct it to be returned *immediate*. *Hill. 23. Car. B. r.* For to retorne it in dilate, is to retorn with as much speed as may be, and not to use any trifling excuses or delays to retard the retorn of it: but to retorn it *immediate*, is impossible, for it will require some con-

ent time to do it in, and as it may fall out, longer than expected.

All Habeas Corpus's to inferior Courts within 12. miles of London are to be returned immediate.

*Depositions.*

Depositions taken in a Cause depending in Chancery, though the cause be there determined or dismissed, may be given in evidence at a tryal at the bar, in a suit depending here touching the same matter, between the same parties that sued in the Chancery: if the party that deposed to the Interrogatories be dead at the time of the tryal, else not: if those witnesses must appear in person in Court, and be examined *viva voce* in the Cause, and so it is of depositions taken in any other Court. *Mich. 24. Car. 1. For the fairest way of examination of Witnesses, the open examination of them in Court, that all parties concerned, may hear them examined, and have liberty to cross-examine them. In-must be = the King & Answer ready.*

*Discretion.*

Where a thing is left to any person to be done according to his Discretion, the Law doth intend it must be done with sound Discretion and according to Law; and this Court hath power to redress things that are otherwise done, notwithstanding they be left to the discretion of those that do them. *Trin. 23. B. r. For their Discretion is not properly Discretion, if folly or madness that act things contrary to reason, and against Law.*

*Devise*

*Devise.*

A Devise of the profits of Lands for years, Devise of the Lands themselves, for so many years as the profits are Devised. *Trin. 23. Car. B.* For except he have the Lands, he cannot come to the profits.

If a man devises his Lands to his children without saying more ; this is but a Devise for life. *Eliz. B. r. In Dickons and Marshals Case adjudged. 23. Car. B. r.* Because there is no estate limited, but the Law doth limit, which cannot be intended greater for life.

A Devise to one of any thing which the Law would have cast upon him, although it had not been Devised unto him, is a void Devise ; as a Devise to the Devisees son and heir in Fee, is a void Devise, for the Law shall adjudge him, to be in by descent. *Mich. 24. Car. B. r.* For his title to it by Law, is his ancient and best title, and the Law will adjudge him to be in by that.

An Administrator of a Term cannot Devise it, but an Executor of a Term may ; for an Executor hath a greater interest in his own right, than an Administrator hath ; but an Administrator of a Term may during his life time sell it, and the sale shall be good, but Devise it he cannot, because the Devise doth not take effect till his death, and immediately upon his death the Law vests it upon the Administrator *de bonis* of the first intestate. 1651. B. r. But an executor hath power from the Testator, an Administrator is impowered by the Ordinary.

*Deodands.*

*Deodands* (that is) the Goods and Chattels, of which *de se* (that is) of him that kills himself, do belong to the Kings chief Almoner (that is) he that disposeth the Kings Alms, to distribute them to the poor, or employ them in other pious uses, and a discharge given for them to any person that hath such goods of *de se*, in his possession by the Almoner or his deputy, is a good discharge in Law for them; but a discharge given for them by an under-deputy, is no good charge. *Trin. 23. Car. B. r. For he is no such Officer the Law takes notice of.*

Any thing which is fixed to the Freehold cannot be seized to the Almoner as a *Deodand*. *Trin. 16. Car. 2. in B. R. the King versus Cross and Babin, per Cur.*

*Demurrer.*

If a Demurrer be entered, it cannot be waived, except both the Plaintiff and Defendant do consent unto. *Mich. 22. Car. B. r. Nor then without leave of the Court; because by the Demurrer both parties have submitted the matters in Law in question betwixt them to the judgment of the Court.*

Demurrer may be upon a replication Rejoinder, as well as upon a Plea. *Mich. 23. Car. B. r. For all of a pleading to issue ought to be according to the rules of Law, and if any part fail, the whole is void; and may therefore be Demurred unto.*

If the Court do perceive that a Demurrer is put in to put off a Tryal, or for delaying of the proceedings

ceedings, they will not allow of such a Demurrer. *Mich. 22. Car. B. r.* And *24. Car. B. r.* For though the Court will not hinder the party to take advantage of an ill pleading, by suffering him to demur to it, that is to demand the judgment of the Court whether he shall make any answer to it, yet the Court will not favour any party by colour of Demurring to a Plea where there is no probable cause to do it, so much as to delay the adverse party thereby.

Where there ought to be alledged a place from whence the *venue* should come, and it is not alledged but omitted, and yet an issue is joyned between the parties; and the *venire* is from the body of the County, the Defendant may Demur upon the *venire facias* (if he will) but if he do not Demur, but suffer the tryal to pass, this is a good tryal. *Mich. 22. Car. B. r.* For he hath slipped his advantage of Demurrer: and here is a fair tryal and a Verdict given upon the Oaths of twelve lawful men who heard the evidence, and shall be intended to have well understood the matter of fact in question betwixt the parties.

Where a Statute gives leave to plead generally, and the party waives this leave and pleads specially, the other party may Demur upon his special Plea if he see cause. *Pasc. 23. Car. B. r.* For though he needed not to have pleaded specially, yet having done it, the Plea must be good at his own peril; and the party is not to be barred of taking that advantage of exception to the Plea, which the Law doth give him if it be not a good Plea.

A general Demurrer doth not lye to a Scirefac-  
*us. Pasc. 23. Car. B. r. For it is in the nature of*  
*judicial Writ; and shall therefore be intended to be*  
*and, except a particular cause of exception to it be*  
*edged.*

Upon a Demurrer to an evidence given to a Jury *tried. 3. Feb.*  
 at tryal, the Jury are to be discharged and not to *C. 4. 123. 12*  
 upon the tryal: But the matter in Law (in que-  
 stion) upon the Demurrer is referred to the Judges to  
 determine. *Pasc. 13. Car. B. r.*

A Demurrer to an evidence is, when the party  
 doth demurr upon it, doth demand the judg-  
 ment of the Court, whether the matter given in evi-  
 dence be sufficient (admitting it to be all true) to  
 make a verdict for the Plaintiff, upon the issue that  
 is joyned betwixt him and the Defendant. *Pasc. 23.*  
*B. r. And when such a Demurrer is taken, the*  
*Plaintiff and the Defendant must agree the matter of*  
*in dispute betwixt them, otherwise the Court can-*  
*not proceed to determine the matter in Law: but there*  
*shall be a Venire de novo to try it. Trin. 23. Car.*

The party that is delayed in his proceedings by  
 reason of a Demurrer, may move the Court, to ap-  
 point a short day after to hear Counsel speak to the  
 Demurrer, and the Court will grant it. *Trin. 23. Car.*

For the Court ex Officio is bound to further the  
 proceedings in Law depending before them as much as  
 conveniently may be.

Upon a Demurrer upon an evidence, the party de-  
 manded unto, may demand judgment of the Court,  
 whether he ought to joyn in the Demurrer or not.  
*23. Car. B. r. For if there be not a colourable*  
*reason for to ground the Demurrer upon, the Court*  
*will*



*will not force the party to joyn in, but will overrule it, the justice may not be frivolously delayed.*

It was said by *Glyn Chief Justice*, 1658. Upon a Demurrer in Trespass and Ejectment between *Baile* and *Newton*, that he that Demurs, confesses thereby all the matters in fact alledged by the other party, but he doth not thereby admit of the errors in pleading.

One cannot demurre upon a thing upon what an issue cannot be taken, by reason of the doubleness, and by consequence, doubtfulness of the matter. *Trin. 23. Car. B. r.* For a Demurrer must be certain, that the Court be not inveigled thereby.

After the Plaintiff and Defendant have joyned in the issue which is to be tryed betwixt them; neither of them can Demurre without the consent of the other. *Tri. 23. Car. B. r.* For by their joyning in the issue, both parties have admitted the whole pleading to be good as to try the Issue; and therefore it is too late then to demurre.

There must be a special Demurrer to a negative pregnant (that is) a negative Plea, which doth (alledge) contain in it an affirmative, and to an argumentative Plea, (that is) a Plea, which concludes nothing directly, but only by way of argument or reasoning) and to a double Plea; for a general Demurrer, doth admit them to be good. *Mich. 23. Car. B. r.* For it doth not shew any fault in them as a special Demurrer doth; and the Court will intend every pleading to be good, till the contrary do appear.

One may demurr to a Demurrer for the doubleness of it; for a Demurrer ought to have formality and certainty in it to avoid barbarisme, an inveigling of the Court; but if one that might Demurr, doth

not demurr to it, but joynes in the Demurrer, he cannot demurr afterwards, for he hath slipped his advantage. *Mich. 23. Car. B. r.*

A Demurrer is double, when that he that doth demurr, doth assign, in his Demurrer, (for cause of it) an error in fact, and another error in Law, to be in the Plea upon which he demurs; which he ought not to do in one Demurrer. *Mich. 23. Car. B. r.* If either of the causes of Demurrer be true, it is enough to overthrow the Plea, and it is at his liberty to insist upon that which is best for his own advantage; not upon both, for this were to puzzle the proceedings.

One may demurr to one part of a Declaration, and plead to the other part of it with a *Quoad*, &c. *Mich. 23. Car. B. r.* For this is but to admit of what is pleaded, and to deny the rest.

*Discharge.*

If an Attatchment be granted by the Court against a party, and he is thereupon apprehended, he shall not be discharged upon an *affidavit* made on his behalf: he that is attatched, must appear in person in Court, and be there Discharged. *Mich. 22. Car. B. r.* It is a personal offence for which he is attatched, and shall not therefore be discharged, except he yield obedience in person.

A paroll agreement before it is broken, may be discharged by paroll; but after it is broken, it cannot be discharged without satisfaction made for the breach of it. *Hill. 22. Car. B. r.* For by the breach of it, an offence is done to the party which requires satisfaction. *Hill. Car. B. r.* And such satisfaction cannot be discharged by paroll. If

If one be arrested by a *Latitat* out of this Court and the Plaintiff do not declare against him in the Terms after ; if the Defendant move the Court he may be discharged, because the Plaintiff doth not prosecute his suite against him, the Court will not charge him. *Pasc. 23. Car. B. r.* For liberty is precious and much favoured in Law, and the Court will not give the Plaintiff half no cause of Action, that is so slow in prosecution of it.

It is now a controverted point, that if the Prisoner keeps a prisoner to escape, and afterwards a *Scire facias* sued out against the Defendant, and the Nichils returned, and he taken again, whether it be lawful or no, the Court was divided in opinion. *21. Car. 2. Reg. in Com. Ban.*

If the Plaintiff, at whose suit the Defendant is in execution, do give the Defendant leave to go at large (that is) out of prison, the execution is thereby discharged : and if the Plaintiff do take the Defendant again upon the same execution, and commit him to prison, the Defendant may bring an *Audita querela* against the Plaintiff, for his illegal imprisoning of him. *Mich. 23. Car. B. r.* For it shall be intended, that the Plaintiff had satisfaction upon the execution, or that he would not have given the Defendant leave to go at large, and therefore if he take him again upon the same execution, the Law will adjudge it an unjust vexation, for which an *Audita querela* doth lie.

A Prisoner that is committed for Felony, and is brought to this Barr by a *Habeas Corpus*, cannot be discharged, although the return upon the *Habeas Corpus* be not sufficient to give the Court satisfaction that he was justly committed. *Pasc. 24. Car. B. r.* For the Court is alwaies cautious how they

erty to Capital offenders, because the punishing of such offences concerns much the good of the Kingdom in its peace and safety.

A Prisoner that is brought to the Barr, to be bailed by a Writ of *Habeas Corpus*, if he were committed in matter on the Crown side, he must be brought to Court on the Crown side, (that is) on that side of the Court where the Master of the Crown-Office sits; but if he stands committed for a matter determinable on the Pleas side, he must be brought into Court, to be bailed on that side of the Court where the Master of the Kings-Bench Office sits, viz. on the left hand of the Lord Chief Justice. *Pasc. 24. Car. B. r. For the Kings Bench Court is a Court which holds Plea in a double capacity, viz. in Criminal matters which concern the Publick, and in Civil matters arising betwixt subject and subject; and in those respects it hath several Justices and Officers appropriated to the transaction and dispatch of matters Criminal and Civil; and those Officers have their constant and known Offices and places in Court for dispatch of such matters.*

Of later time it hath been permitted by the Court to Discharge the Bail, if he bring in the principal before the return of the second *Scire facias* laid out against the Bail, but anciently it was otherwise. *10. Mich. 24. Car. B. r. This is in favour of the law, whom I conceive the Law doth therefore favour, because it judgeth it hard for one man to pay another a debt, which he intended not to do, though he be bound to bail for him.*

A Judgment cannot be Discharged by pleading a special agreement between the parties to Discharge it. *1650. B. S. For, matters of record are not to be wiped off with words; for records are things made*

*upon solemn deliberation, and are of a high nature, great regard in Law.*

*Disseisor.*

If one enter wrongfully into my Lands, and after his entry I accept rent of him for the Land, I cannot afterwards take him for a Disseisor. *Trin. Car. B. r.* For by my acceptance of the rent I have assented to his entry, and purged the wrong by admitting him for my Tenant.

*Distress and Distringas.*

The seising of a stray is not a Distress of it, for that doth seise it claims a property in it, viz. additional property, that is, if it be not owned within a year and a day. *21. Car. B. r.* And none can claim that in which he claims any property to Distrain, is but to take one thing from another, and put it into the custody of the Law, as a pledge for another thing which is due to him that doth Distrain, from that is Distrained.

An amercement lies not against a Sheriff out of Office, for a misdemeanour done by him, whilst he was in his Office; but a *Distringas nuper Vicecomes* lies against him for it. *Pasc. 24. Car. B. r.* For an amercement lyes properly against an Officer of the Court for some misdemeanour, and is not a process of the Court as a *Distringas* is; which may issue forth against that is a stranger.

The Writ of *Venire facias*, for the Sheriff to summon a Jury, is returnable by him into the Court.

and upon the retorn made of it to him, there issues out of the Court another Writ called a *Distringas Juratores*, to cause the Jury to appear in Court at the tryal of the Cause, if the tryal be at the Barr in this Court, or at the Assises in the County where the Action lies, if the tryal be to be there. *Mich. 24. Car. B. r. The Venire is in the nature of a summons, but a Distringas is a process of a higher nature to make them appear upon a penalty.*

The Writ of *Distringas Juratores* ought to be delivered unto the Sheriff so timely, that he may warn the Jury to appear four daies before the Writ is returnable, if the Jurors live within fourty miles of the place of tryal, and eight daies if they live further off. *13. Maii. 1651. B. S. That they may have time to settle their own businessses, and prepare for their travelling.*

### *Discontinuance.*

A process is said to be Discontinued, when it appears by the Record that there was some time where- by some defect or other in the Record, the Court took no notice of the Cause depending, nor took care to continue the proceeding therein, in order to the determination thereof, but the parties were *sine die* in Court.

A Discontinuance in process is helped, if there follow a Verdict in the cause, and the party do also appear upon the Verdict. *21. Car. B. r. For by the verdict and appearance thereupon, it is admitted that the process hath been duly proceeded in. Q. Whether every Discontinuance of process may be thus helped.*



Where a Vouchee may be essoigned, and the essoigne is not adjourned, this is a Discontinuance : but where it is not necessary the vouchee should be essoigned, there the want of adjournment of the essoigne, makes no Discontinuance. *Hill. 22. Car. B. r.* Because where an essoignment is necessary, there it is an accomplished part of the process, and the not adjournment of it must be a Discontinuance of the process ; but where it is not necessary, there it is accomplished as no part of the process, and for its not being adjourned doth not Discontinue the process.

An appeal may as well be Discontinued by the defect of the process or proceeding in it, as it may be by insufficiency of the Original Writ. *Hill. 22. Car. B. r.* For by such defect in the proceeding, the matter depending in Court is as it were out of Court, and matter not depending ; although the Court was sufficiently at first possessed of the cause by the sufficiency of the Original Writ : But if the Original Writ be not good, the Court is not rightly possessed of the cause, and then all proceedings upon it are null, and are to be discontinued.

The Plaintiff cannot Discontinue his Action after a Demurrer joyned and entred, or after a general or special Verdict found, or after a Writ of Enquiry executed without leave of the Court, Per Magistrum Livesay, & alios, &c. *Pasc. 21. Car. 2. Reg.*

The Plaintiff may Discontinue his Action by the leave of the Court, after he hath joyned in Demurrer with the Defendant ; paying Costs to the Defendant, if the demurrer was only upon matter of form.

the pleading : But if the demurrer was as well upon matter of substance as upon matter of form, he cannot discontinue his Action by leave of the Court, *Mich. 24. Car. B. r. Except the Defendant will consent unto it ; for there is great difference betwixt a demurrer joyned upon a matter only of form, and a demurrer joyned upon matter of Law and substance, and the parties nor the Court can alter the Law, though the parties all consent.*

A Discontinuance of an Action or Suit, is not a defect discontinuance, until it be entered upon the Roll : for the entry of it makes it part of the Record, and a Record cannot be Discontinued, but by matter of Record ; but if this Discontinuance be to be readed, it is not necessary to plead the entry of it. *Tr. Car. B. r. For it shall be intended that it is entered without shewing it.*

In the Case of *Robinson and Vanbragg, Mich. 1650.* After a demurrer joyned, and spoken unto by Counsel on both sides, it was moved that the Plaintiff might Discontinue his Action. *Glyn* Chief Justice answered that this motion hath been sometimes granted, and sometimes denied ; and that the Common Pleas denied this motion in the Case of *Miller and Baker.*

Where a demurrer is a general demurrer, where it ought to have been a special demurrer ; this is Discontinuance, and there can be no judgment given in the Case upon such a demurrer. *Hill. 23. Car. r. Because by the Discontinuance the cause is out of Court.*

After a demurrer upon an arbitration pleaded, it is not usual to discontinue the Action. *Mich. 24. Car. B. r. But to argue the demurrer to trie the validity*

*validity of the arbitration so pleaded to avoid lay.*

*Demand.*

Where there is a Demand of a thing to be made there the Demand must be a Legal Demand, (that is) it must be made in such manner as the Law requires; otherwise he that made the Demand, can take no advantage in Law upon this Demand. *Hill. 21. Car. B. r.* That is where the Law doth direct a Demand to be made by one person unto another; for the doing whereof, he that demands the thing to be done, by Law take an advantage against the other person, for the not doing thereof, there it must be a Legal Demand.

If there be no place expressed in a Deed, where the rent for Land, or a *nomine pœna*, or any other thing demandable shall be made, the Law doth then direct, that the Demand shall be made upon the Land &c. out of which the rent, or *nomine pœna*, or other thing demandable do issue or go out of. *Hill. 21. Car. B. r.* For that is the most proper place to make such a Demand, because the rent and *nomine pœna* take of the nature of the Land, out of which they issue; the parties by their agreement may direct the Demand to be made elsewhere; for *modus & conventio vincit Legem*.

A Demand of a rent reserved upon a Lease made of a Messuage with Lands belonging to it, ought to be made at the Messuage; because the Messuage is the most eminent part and place of the thing let, and most notorious for the Lessee to take the best notice of the Demand, *21. Car. B. r.* For the Lessee shall

*presume*

presumed to be more conversant there than in any other place. Yet if the Demand were made upon any part of the land, and the Lessor can prove that the Lessee was there and took notice of it, I suppose it is a good Demand: but if he be not there when the Demand was made Q. then no good Demand.

The parties bringing of an Action of Debt for monies due upon an Obligation, and the taking of a distress for rent by him unto whom the rent is due, is a good Demand in Law of the Debt due by the Obligation, and of the rent. *Trin. 22. Car. B. r.* For in the one case the money is demanded in Writ, and in the other the taking of the distress is a real, though a fictitious Demand of the duty due, for the which the distress is taken.

A Demand in a precipe to recover Lands, ought to be more certain than a Demand in a Writ of Dower. *3. Nov. 1650. B. S.* For Dower is one of the things secured in Law, and the Demand in Dower is supposed to be made by a woman, who is not presumed to be conversant of the Punctilio's of the Law.

*Declaration.*

A Plaintiff after Plea pleaded, or before, after the second Term shall not add a new count to his Declaration, as in *Indebitatus assumpsit*, or like, upon pretence of mending his Declaration. *Magistrum Livesay, & alios &c. Pasc. 21. Car. 1. Reg.*

Declaration may be against one that is in custody of the Marshal of this Court upon an information, although

although he do not appear to an Action. *Hill 21. Car. B. r.* For his appearance is not necessary, because, being in custody, it is as much as if he had appeared and given bail to the Action, or else committed for not giving bail.

The Plaintiff is not compellable to his Declaration; yet if it be not filed, and afterwards judgment is given in the Cause for the Plaintiff upon demurrer upon default, or confession, the judgment is erroneous for want of a Declaration. *Hill 21. Car. B. r.* Before it is filed it is not upon record, and so there is no Declaration to warrant the judgment. He is not compellable, because the Law presumes he will do it because the prejudice may befall him by the not doing of it, and the Law will not do needless things.

If the Plaintiffs Attorney do file a Declaration against the Defendant in the Kings Bench Office, the Defendant is bound to take notice of the Declaration on at his peril. *21. Car. B. r.* And it is not necessary for him to give a Copy of the Declaration to the Defendants Attorney; for he may take one out of the Office, yet it is usual to give a Copy, and it is accounted to be fair practice to do it: and by some Attorneys I have heard it affirmed that it is necessary, and ought to be done, otherwise it is irregular practice.

If an Information be upon a corrupt Contract made against the Statute of 21. Jac. made against Usury, he must express in the Information, that the Defendant corrupte agreevit, or else he must shew, that the Contract was made *pro usura*, contrary to the Statute. *21. Car. B. r.* For he must pursue the words of the Statute, and those words are the very foundation upon which the Statute doth enable the Plaintiff to bring an Action.

One may not Declare against one that is not either *custodia Marefchalli*, or that hath not filed his bail, that it not a priviledged person in this Court. 21.

*B. r.* For no other waies can any one be said to be ent in Court, and so the Court hath no consufance of matter. For if the Defendant be in a County, or other Prison, the Plaintiff before he can Declare against him, must bring him up, and turn him over *Habeas Corpus*.

Where and how a Declaration may be amended, where not, *vid. Amendment*.

If one be in custody of the Marefcal of this Court the suit of *I. S.* or have put in common bail in Court to the Action of *I. S.* any other person may in a Declaration against him, the same Term he is committed, in custody, or did put in Bail as aforesaid. 21. *Car. B. r.* For his being in custody, or his being in Bail do suppose him alwaies present in Court to answer any person, so that it is needles to take out any other process to bring him in to answer, but upon such declaration given unto him he must plead at his

If the Plaintiffs Atturney, deliver a Declaration to the Defendants Atturney, and after doth amend his Declaration, and tenders another Copy to the Defendants Atturney, *viz.* as he hath amended it; the Defendants Atturney is not bound to receive it, except the Master of the Office do order him to receive it, or that the matter be moved in Court, and thereupon the Court do order him to receive it. *Mich. 22.*

*B. r.* For it may be in the substance of a new Declaration, and may require a different Plea, which the Master of the Office, or the Court must judge of, and not Attorneys.



The Plaintiff may amend his Declaration in matter of form, after a general issue pleaded before Entry, without paying costs, or giving imparlance; but if he amend in substance, to pay costs or give imparlance at his election: but if he amend in substance after a special Plea pleaded, to pay costs though he would give imparlance. Per Magistrum Liver & alios, Pasc. 21. Car. 2di. Reg.

145. The Plaintiff in this Court is not bound by Law to Declare against the Defendant, within the Terms next after his appearance upon a Habeas Corpus in Court to the Plaintiffs Action; But the Court upon the Defendants motion doth usually make the Plaintiff declare his cause of Action before that there be not cause to give special bail, that the Plaintiff may be enforced to let the Defendant go at large upon common bail; but if he do not declare against him in three Terms next after the Plaintiff must then take common bail of him Mich. 22. Car. B. r. and Mich. 1650. B. S. it shall be presumed, if there had been cause for special bail, the Plaintiff would not have been so dilatory in his proceedings, and besides the Defendants imprisonment is made longer by the Plaintiffs delay, and is considerable.

A Declaration must be certain, and the Court will not take things in it by implication; and also if it be not certain, the Defendant cannot make a direct answer unto it. Mich 22. Car. B. r. and Pasc. 24. Car. B. r. As he ought to do: for the Law loveth plain dealing, and allows not of subtil and catching pleadings.

*the Accomplish'd Atturney.* 148

The Plaintiff is to enter his Declaration in the Office, and all Copies which are made of it, and the record it self of the Cause, ought to be directed and warranted by it. 22. Car. B. r. *For the entring of it there, puts it into safe hands, and makes it substantial, and it is the groundwork of the Cause depending.*

If an Action upon the Case be brought upon an Assumpsit, the Plaintiff must declare upon the whole promise made, and not upon part of it, else the Plaintiff upon the tryal will be Non-suit. Mich. 22. Car. B. r. *For the omitting of any part of the promise may alter the promise, and make the Case different for the truth and reality of it, as it would have bin if the whole promise had been truly set forth.*

Where the Plaintiff doth declare as Executor, or Administrator, he ought to set forth the Probate of the Will, and the Letters of Administration granted unto him, in his Declaration, otherwise the Declaration is not good, but the Defendant may demurr upon it. Mich. 22. Car. B. r. *For without shewing them, they do not entitle themselves to the Action brought, nor make themselves persons enabled by Law to bring the Action; for it doth not appear to the Court that there was such a Will made, or that there were such Letters of Administration granted, or that the Plaintiffs are Executors, or Administrators under which title they sue.*

If a Declaration be defective in matter of form only, and the Defendant doth take no exception against it, but pleads to issue, and a verdict is thereupon found for the Plaintiff, the Defendant cannot afterwards take advantage of this defect in the Declaration, for the defect is helped by the verdict: but if the Declaration be insufficient in matter of substance

stance, the verdict will not help it, but the Plaintiff may take the advantage of the insufficiency of it against a verdict. *Mich. 23. Car. B. r.* For where it is defective in substance, there can be no good judgment given, notwithstanding the Verdict which only finds matters of fact and leaves the Law to the Court.

All matters which do lye in the cognizance of the Court ought to be set forth certainly in a Declaration; for the Court is to give judgment upon the pleading, as it stands plain and clear before them; but it is not necessary to set forth certainly matters of fact which are tryable by the Jury. *Hill. 22. Car. B. r.*

If the Plaintiffs Attorney cannot find the Defendants Attorney to deliver a Declaration unto him, he may file the Declaration in the Office, and the Plaintiff shall be accounted a good delivery of it; so that if the Defendant do not plead according to the Rules of the Court, judgment may be entred against him. *Pasc. 13. Car. B. r.* For it is intended, that Attorneys ought to attend in the Office, and there to inform themselves in the proceedings of their Clyents Causes. *Q. Whether he can find him, whether he must deliver the Declaration unto him; for the Court held he need not, but Hodges the Secondary held the contrary, and it is the common practice to deliver a Copy of the Declaration to the Defendants Attorney.*

A thing that is good and warrantable to be pleaded in a Writ, is good and warrantable in a Declaration. *Trin. 23. B. r.* For the Declaration is grounded upon, and warranted by the Writ, and the Declaration doth but set forth at large what is summarily expressed in the Writ.

If there be words in a Declaration which have no significance

signification, the words shall be adjudged to be void words, and shall not hurt the Declaration, but the Declaration shall be taken, as if those words were set out of the Declaration. *Hill. 23. Car. B. r. Pasc. 24. Car. B. r.* If there be other words sufficient in the Declaration to make it a good Declaration.

A Declaration in English is not good, for all pleadings in Law ought by the Statute to be in Latin. *Pasc. 24. Car. B. r.*

An *Audita querela*, and a *Scire facias*, are in the nature of a Declaration. *Pasc. 24. Car. B. r.* For they do set forth at large the cause of the Plaintiffs Action, as a Declaration doth.

Declarations which are grounded upon original Writs, as all Declarations in the Court of Common Pleas are: if they be faulty, they cannot be amended, but Declarations grounded upon a Bill, as the Declarations in the Court of the Kings Bench are, are amendable if they be faulty. *Pasc. 24. Car. B. r.* For Declarations grounded upon Originals must agree with the Originals; and if they be faulty, it is intended that the Original upon which the Declaration is grounded is also faulty, and so the Plaintiff must purchase new Original; but a Declaration in the Kings Bench is grounded upon the Latitat or Bill of Middlesex, but the Plaintiff declares at large, and as his Case requireth; the Latitat or Bill of Middlesex do not set forth the cause of Action as Originals do, but run generally for a Defendant to answer to a Trespass, but where special bail is required, the old course of the Court is altered by a short expressing of the cause of Action in the Bill of Middlesex or Latitat, since the Statute of 62.

If a Declaration be drawn in the Term, but is not delivered to the Defendants Attorney that Term,

Term, but is delivered unto him before the first Effoigne day, of the next Term after, this shall be accounted for a Declaration of that Term when it was drawn, and not of that Term when it was delivered. The Effoigne day is sometimes one day, sometimes two daies before the Return of the Writ, on which day, the party may come in, and make his excuse why he cannot appear precisely upon that day, if he have any Legal excuse to make, and this is called an Effoin. *Trin. 24. Car. B. r. For before the Effoigne day, the Term as to such purposes, is not said to be begun, for before that day, it cannot be known whether the Defendant will appear precisely at the day of the Return of the Writ, or be Effoined.*

A Declaration may be filed in the Office, many years after it was first drawn: if it appear that it was only the Attorneys neglect that it was not filed as it ought to have been. *24. Car. B. r. 19. Apr. 1641. B. r. For the filing of it is not of the essence of the Declaration; for it is a good Declaration to proceed upon without the filing of it, and the filing of it is but to prevent future practice, and to keep it upon Record to warrant the proceedings.*

If bail be filed for the Defendant, the Plaintiff may declare against him, in any other matter besides the matter that is contained in the Writ brought by the Plaintiff against the Defendant. *Mich. 24. Car. B. r. Because the Writ runs generally only to answer the Plaintiff in a Plea of Trespass, where special bail is not required, and doth not set forth the nature of the Action.*

A Declaration delivered with Impar lance, or *li. fully* is in the language and meaning of Attorneys, such a Declaration that is delivered, with leave for the Defendant

Defendant to emparle until the next Term. *Hill.*  
*649. 12. Feb. B. S.* The words by *Li, lo, do* mean Licen-  
 interloquendi, which is as much as to have licence, or  
 to emparle, or to advise and speak with his Clyent to  
 what he should plead for him.

When one is arretted by a *Luitat*, or Bill of *Mid-*  
*sex* out of this Court, he is not said to be in  
 custody of the Marshal, until he hath put in bail  
 the Plaintiffs Action, and the bail be filed; or  
 be taken by the Writ, and committed to the  
 arefchal for want of bail: and if from that time,  
 the Plaintiff do not declare against the Defendant *140*  
 three whole Terms after, which he cannot be  
 compelled to do, then he must accept of common  
 bail, and discharge the former bail. *Trin. 1650. B. S.*  
 the Court will presume his cause of Action is but small,  
 and requires not special Bail, because he is so slack in his  
 proceeding.

By *Glyn* Chief Justice. *Trin. 1658.* If one do de-  
 are upon an Obligation with a *hic in Curia prolat'*  
 and do not shew the Obligation, this is not a good  
 declaration, and therefore after three Terms, the  
 defendant if he be in *Custodia* may go at large up-  
 Common bail; but the Defendant must pray  
 ver of it, else the Plaintiff is not bound to shew

The Plaintiffs Atturney is not bound to give a  
 copy of the Declaration against the Defendant, to  
 the Defendants Atturney. *13. Novem. 1650. B. S.*  
 the Defendants Atturney may take a Copy of it out  
 the Office, where the Declaration is filed, yet they  
 usually do it, and it is accounted fair practice to



By *Glyn* Chief Justice, *Mich.* 1658. Upon a motion in arrest of judgment, a Declaration in a meer Action of Trespas, *quare vi & armis* is not good without *quodcum*, &c. because there is no absolute affirming of the Trespas but only by inference: but an Action upon the Case is good enough; the reason is because in a Trespas *vi & armis*, a fine is to be paid to the King by the party for breach of the peace, and therefore the trespass must be positively averred, but in the latter case, damages are only to be recovered and the Defendant amerced.

It is not necessary for the Plaintiffs Attorney, to set his hand unto the Declaration, which he delivers to the Defendants Attorney: but the Defendants Attorney must receive it without his hand set to it: he know him to be the Attorney in the Cause. *Nov.* 1650. *B.S.* But if he doubt whether he be or no, it is otherwise.

If one be in custody of the Marshal of this Court, any person may put in a Declaration against him, and the Declaration so put in is a good Declaration, and the party must plead unto it, although he be illegal in custody, for the Court will not trouble themselves to enquire how the party came into Prison. *Pass.* 1652. *B.S.* And being in custody he is bound to answer every ones suit.

If a Prisoner be brought into the Court of Kings Bench by a Writ of *Habeas Corpus* to answer his Suite there depending against him, a stranger cannot declare against him there upon the by, until he be in custody of the Marshal: but he that brought the Prisoner thither, by the *Habeas Corpus* may declare against the Prisoner in Court, before he is turned over in custody to the Marshal. *Pass.* 1652. *B.*

for the very Writ of Habeas Corpus, was to bring him into Court to answer to the party; but a stranger to the Writ, cannot take notice of his being in Court, but he may take notice when he is custody, though it be at the suit of another, and needs not to take out process against him, that is needless.

In the Case of *Milner* against *Tems* Sheriff of *London*, *Pasc.* 1657. It was said by the Court, That if one give bond to the Sheriff to appear at a day upon the cause of Action, and doth not appear, the party that brought the Action cannot sue the Sheriffs bond, and Declare against the party upon another cause of Action; but he may force him to appear at the day according to the bond, without declaring against him; for before his appearance he is not bound to declare his cause of Action.

In the Case of *Cutler* and *Cutler*, *Mich.* 1658. It was said by the Court, That where one may Declare by the Common Law, there he shall not declare upon special Custom; because the Common Law is to be preferred, and therefore, if the Plaintiff do Declare otherwise, the Declaration is not good, if the Defendant will demurr to it; but if he waive his advantage, and plead to issue, and a verdict is found against the Plaintiff, he shall not move this matter in arrest of judgment.

One ought not to declare against the Defendant in this Court, until his Bail be filed; for before he is in custody, as he is by his bail when bail is put in. *Rolls* Chief Justice. *Pasc.* 1652. *B.S.* That is, if he do not put in Bail; but if not, but is turned over to the *Mareschal*, he may Declare against him in custody.

## Duty.

The words *foris faceret* may create a Duty. *Hill. 21. Car. B. r.* For the party to whom a thing is forfeited, has an interest in the thing forfeited, before he recovers it.

Any thing that is known to be due by Law, and thereby recoverable, is a Duty before it is recovered because the party to whom it is due hath a power to recover it, from him from whom it is due.

## Dammages.

Dammages ought not to be given for that which is not (at all) contained in the Plaintiffs Declaration or for that which is immaterially alledged, or against the Law : but only for that which is materially alledged and set forth in the Declaration. *Hill. 21. Car. B. 23. Car. B. r.* For the Law will not repair any one such Dammages due to him, as he complains not for, or in such manner as the Law directis ; for the Law doth only shew every one what is his right, but doth also point out the way how to recover ones right if it be denied.

Where an Action upon the Case, and an Action of trespass, are both founded upon one and the same Damage done to the Plaintiff, he may recover Dammages upon both the Actions. *Hill. 21. Car. B. r.* Because the Actions do not Differ in their natures.

Where a trespass for which an Action is brought is entire, and not several trespasses, there ought to be several Dammages given against the Defendant. *Mich. 21. Car. B. r.* For the Trespass is

one, the Dammmages growing thereupon shall not be  
so be several Dammmages, and so ought not to be di-  
led.

Where one joynt Action of trespass is brought for  
several trespasses, and the trespasses are found  
erally, the Dammmages may be several ; for the  
mmages are to be according to the finding of  
Jury : but if one Action of Trespass be brought a-  
inst three Trespassers, and two of the Trespassers  
inst whom the Action is brought be found guilty,  
d the third is found not guilty, there the Damma-  
may notwithstanding be entire. *Mich. 22. Car. B. r.*  
the trespass is but one joynt trespass, though the Action  
brought against divers persons: But in the former Case,  
re are several trespasses found, and so the Dam-  
ges may be several, though the Action be a joynt  
tion.

In an Action upon the Case, the Jury may find  
s Dammmages, than the Plaintiff layes in his Decla-  
tion: but they cannot find more than is laid in the  
claration; if they do, it is error. *Mich. 22. Car. B.*  
For the Law presumes, that the Plaintiff doth best  
ow how much he is damnified by the Defendant: and  
efore, though it may be, the Plaintiff will pretend he is  
e damnified then in truth he is; (as is often done) yet  
hall not be presumed that the Plaintiff will say he is  
Damnified by the Defendant, than in truth he is. And  
efore for the Jury to give more Dammmages than the  
intiff declares upon, would be unreasonable, which the  
w will not suffer.

Double Dammmages given for one and the same  
respass, are not well given. *Mich. 22. Car. B. r.* For  
Law uses to proportion the amends or satisfaction for

an injury done, according to the loss which the party whom the injury is done, doth receive by the injury, and the Jury ought to alter the Law by their dict.

Upon a judgment given upon a demurrer, upon an Action of the Case, the Court is not to assess the damages, but the Jury is to do it. *Mich. 22. Car. B.* For the Court gives the judgment upon the matter in Law, but the Damages are to be given upon consideration of the matter of fact, which is proper only for the Jury to enquire of, and is left to them to assess, as the Law is determined.

In an Assize the Jury ought to give Damages pending the Suit, because there is no remedy over to recover the Damages, (because there the Land itself is recovered) but in an *Ejectione firme*, the possession is only recovered; but small Damages are to be given. *Pasc. 23. Car. B. r.*

Upon a demurrer to an evidence, the Court directs the Jury, who should have tryed the issue, if the demurrer had not been, to find Damages for the Plaintiff, if upon arguing the demurrer the Court should give judgment for him. *Pasc. 23. Car. B. r.* For the Jury may consider of the matter in fact, which should have been tryed, if the evidence had not been demurred unto, notwithstanding the demurrer, which only concerns the matter in Law, and may find Damages accordingly.

Where Damages are found severally, the Plaintiff may relinquish part of the Damages, and enter his judgement for the rest. *Hill. 23. Car. B. r.* Where the Damages are entire, he may do it with the leave of the Court. *Pasc. 24. Car. B. r. & 19. Ap. 164.* Because they cannot be so indifferently proportioned.

The Jury ought to find Dammmages in a special verdict found in an Action of Trespass and Ejectment: for until the Plaintiffs Title is found, which is not done by the special verdict, the Plaintiff shall be accounted a Trespasser against the Defendant; because the Defendant was in possession of the Land, when the Plaintiff entred and made the Lease of the Land. *Pasc. 24. Car. B. r. For he that is in possession of Land, hath, in presumption of Law, title against all the world, until a better title is proved.* Melior est conditio possidentis, quam petentis.

A debt sued for, doth appear certainly to the Court that it is, and if the Plaintiff recover, the Court shall tax the Dammmages, and not the Jury, because it is apparent, and there needs no enquiry what it is. But in Actions upon the Case, where Dammmages are uncertain, there it is left to the Jury to enquire of and to tax them. *Trin. 24. Car. B. r.*

A Writ of Enquiry of Dammmages in a Cause tryed in the Marshalls Court, may be executed by the Judges in the Court there. *Trin. 24. Car. B. r.* by reason of the special priviledge of that Court, without its own jurisdiction, and for the more quick dispatch of justice.

Greater Costs may be given in some Cases, than the Dammmages laid in the Declaration. *Trin. 24. Car. B. r.* For the Plaintiffs Declaration is onely for the Dammmages due unto him, by reason of the injury done him by the Defendant. But the Costs are given in respect of the Plaintiffs expences in his Suit to recover the Dammmages, which may perchance be far more than his Dammmages suffered by the Defendant.

In a Replevin brought, and a special verdict thereupon



upon found, Costs and Damgages shall be given on either side, according as the issue shall be found upon the determination of the matter in Law.

If a judgment be given upon a *nihil dicit*, in an Action of Debt brought in the Common Pleas, the Court will give Costs and Damgages, and so is it used to be done in interior Courts. *Trin. 24. Car. B. It is so in this Court also.*

If entire Damgages be given in an Action brought for divers several things, whereas it is not possible to have Damgages for some of them, the Damgages shall be accounted to be given for those things only for which Damgages may be given, and the expressing the other things shall be accounted idle & void. *Trin. 24. Car. B. For the Law will not presume the Party to find impossible things, though they may sometimes find impertinencies.*

If an Action of Trespass be brought, and the Defendant pleads, and the Plaintiff will not joyn issue with the Defendant, and he is non-suit for wanting joyning issue and entring upon Record, he shall pay the Defendant Costs, for his false vexation of him. *the Stat. of 4. Jac. 3. And upon very good reason ; that it shall be intended, that if he had had good cause of action against the Defendant, that he would not have come nonsuit ; but would have gone to a tryal, whether he had cause of Action, or not.*

But if the issue be entred, after one default made by the Plaintiff, the Defendant may make the Record: by *Nisi prius*, and try it as if the Plaintiff had proceeded of his own inclinations, and at his own Costs, and such tryal is said to be a tryal by *Record*.

When a judgment is given by default in an Action of Debt, then the Court doth assess the Damages, and not the Jury. Mich. 1649. B. r. For there is no verdict by the Jury, and so they cannot assess Damages, and yet it is not reason but that the Plaintiff should have his Damages which are in effect confessed by the Defendant, by suffering a judgment by default to be against him.

If an Action of Trespass be brought against divers persons, and some of them plead to issue, and others do not, and the Issue is found for the Plaintiff, and Damages are given as well against those that joyned not in the issue, as against them that joyned in the issue; these Damages are well given. Mich. 1649. B. S. For the Trespass is found, and that the Plaintiff was damnified so much by reason thereof, and the Trespass being brought against divers shall be accounted a Trespass done by them all, if it be found against any one, though the rest did not plead to issue; for it was their confaults they did it not, and the Law will the rather account them guilty.

If Damages be assessed, and it is not expressed that they are assessed, *pro Misit & Custagiis*, this is inoperative; for it doth not appear by the Record, what the Damages are assessed as it ought to be. Hill. 1649. 31. Jan. B. S. For Records ought to be certain and not ambiguous, whereby either the Court may be inveigled of any party prejudiced thereby.

All Costs in Replevin and Avowry are given *ex assensu partium*, (that is) by the consent of the Plaintiff, if they are taxed for the Plaintiff, and of the Defendant if they were taxed for the Defendant. By Woodward Clark. Hill. 1649. 4. Feb. B. S. Q.

If the Defendant, whose title is concerned, in an *Ejectione firmæ*, will not defend his title to the Land in question, and the verdict do pass against the Plaintiff, the ejector may release the Dammmages. 11. Feb. Hill. 1649. B. S. *For they do properly belong to him in Law, and the Court will not take notice of him whose title is concerned, if he will not appear to defend it.*

One that sues in *forma pauperis*, if the Cause go against him, yet he shall pay no Costs, if he were admitted to sue in *forma pauperis*, in the suit which passeth against him, before the suit began : for it shall be intended by his admission to sue in *forma pauperis* before his suit commenced, that he was not able to pay costs ; but if he were admitted to sue in *forma pauperis*, *pendente lite*, ( that is ) whilst the suit depended, he shall pay costs ; for it may be he was able to pay costs when he began his suit, and costs have relation to the whole suit. See the Statute. 23. H. 8. cap. 15. By Rolle Chief Justice ; who said, *It had been ( anciently ) held and ruled.* 16. Nov. 1650. B. S. *But Q. what Costs, whether the Costs of the whole suit, or only with relation from the time he commenced his suit, to the time he was admitted to sue in Forma pauperis.*

In a Writ of Dower, if the Plaintiff recover, and yet doth not desire a Writ of enquiry of Dammmages to recover the Dammmages, the Court may tax the Dammmages, 5. Feb. 1650. B. S. *To avoid charges, and this is in favour of Dower.*

The Court may encrease the Dammmages, which are found by the Jury, upon a Writ of enquiry of Dammmages, in an Action of Assault, Battery and Wound.

Wounding; if they see cause, upon the view of the party that was beaten and wounded. *Trin.* 1651. B. S. *This was done in the Case of Davis Plaintiff, and the Lord Foliot Defendant; for of such a matter of fact the Court is as well able to judge as a Jury, and shall be judged to be as indifferent betwixt the parties.*

The Court will not compel the party that is non-suit in a Cause, to pay his Costs upon the non-suit; but if the party will not pay them when they are taxed, the Court will not suffer him to commence his suit again until he have paid them. *Pasc.* 1652. B. S. *For if they should suffer it, this would encourage men to vexations.*

After judgment is given in a Cause depending in this Court, the Court cannot make a Rule for the payment of the Costs which were expended in prosecuting the suit. *By Rolle Chief Justice.* 1655. B. S. *For after judgment the parties are out of Court, for the Cause is determined. Q. And he ought to do it of course, and if he refuse to do, the Court will grant an attachment.*

No other Costs or Damages shall be given upon Recovery, in an Action brought upon the Statute 2. *Edw.* 6. for not setting forth of Tythes, than the Damages which are expressed in the Statute, which is treble damages. 1655. B. S. *For the course of the Common Law, in such cases is altered by the Statute, and it shall be intended, that the Plaintiff shall better satisfaction thereby; and the Statute is to be followed.*

By *Glyn Chief Justice* in a tryal at the Barr. 1655. B. S. Between *Wood* and *Junston*, If an Action be brought for words spoken at three several

several times, the Jury may give Damgages for the speaking of them at one of those times ; for the Plaintiff may have three several Actions for them.

### *Deputies.*

The Common Law doth in many Cases take notice of Deputies, but it doth never take notice of under-Deputies. *Trin. 23. Car. B. r. As of the under-Sheriff, who is but the Sheriffs Deputy, sub-Almoner, or Deputy-Almoner. For in many Cases, an Officer may by Law make a Deputy ; but a Deputy hath no power to depute another under him : for the same reason the Deputy of a Deputy might make a Deputy, & sic in infinitum ; which would be very mischievous.*

The King by his special Commission may make Deputy Escheators, to finde an Office, after the death of an Honourable Person. *Pasc. 24. Car. B. r. As of a Duke, Earl, Marquess, Viscount, Baron, &c. Q. Whether in some special Case he may not do it after the death of one that is not of the Nobility. It seems he may, and there is no prejudice to any by doing it.*

### *Default.*

Before a verdict is taken by Default, the Cryer of the Court doth call the Defendant three times ; and then if the party do not appear, the Plaintiffs Counsel doth pray the verdict may be so entred. *Hill. 21. B. r. He is called three times, to shew that the Law doth not do things rashly against any one, but with circum-*

*spection*

action, and with favour (as much as may be without injustice) towards offenders.

Debt.

An Action of Debt doth lye against the Husband, for goods which were delivered as sold unto the Wife, because the Law doth intend, that they were employed and came to the use of the Husband. *Hill.*

*1. Car. B. r. And the Husband and the Wife are but one person in Law, and the Law intends that a man hath the government of his Wife, and that the Wife doth not do any thing without the leave of her Husband, but by his direction or licence, and for his good, though it too often falls out otherwise, to the great prejudice of the Husband. It was held quite contrary in a special verdict between Manby and Scot, lately argued by all the Judges in the Exchequer-Chamber : Ergo Q.*

If there be an erroneous judgment given for the Plaintiff in a personal Action in the Common Pleas, and thereupon he brings an Action of Debt against the Defendant upon the erroneous judgment in this Court, the Action will well lye here, until the judgment in the Common Pleas be reversed by a Writ of Error. *21. Car. B. r. For an erroneous Judgment is not void but voidable; and till it is Legally made void, it shall be intended to be a good Judgment. But when it is made void by a Writ of Error, then there is no ground to support the Action of Debt, so that then it cannot be maintained.*

If one do assume upon a consideration, moving *A. 2. 30.* from I. S. to perform a thing which concerns A. B. and do not perform it, I. S. may bring an Action of *v. 163.* the Case upon the Assumpsit against him, that did so assume upon himself. *Mich. 22. Car. B. r. For the Action*



*Action* is grounded upon the promise made, to I. S. upon the consideration moving from him, and the not performing it to I. S. to whom it was made, is a sufficient breach to ground an *Action*.

In some case, an *Action* of Debt will lye, though there be no contract betwixt the party that brings the *Action*, and him against whom the *Action* is brought. *Mich. 22. Car. B. r.* For there may be a duty due to one without any contract, viz. created by the Law, for which an *Action* will lye.

An *Action* of Debt lies against a Sheriff for moneys which he hath levied by vertue of a *Writ fieri facias*, for the party that did recover the moneys; for the Law doth create a privity by the *fieri facias*, betwixt the Sheriff and the party that is paid out the *fieri facias*. *Mich. 22. Car. B. r.* And the moneys levied is the Plaintiff's due, which the Sheriff is tyed by Law to pay him.

If an *Action* of Debt be to be brought against an Administrator for Rent which was due by the testate upon a Contract made betwixt him and the Intestate in his life time, the *Action* must be brought in the County where the Contract was made; but if an *Action* of Debt be brought against an Administrator, for Rent due for Lands, lett by the Plaintiff to the Intestate, but growing due in the time of the Administrator, viz. since the Letters of Administration were granted unto him, the *Action* must be brought in the County where the Lands do lie for which the Rent is due. *Mich. 22. Car. B. r.* For in the former Case, the *Action* is meerly brought upon the Contract made with the Intestate; but in the latter Case it is brought in respect of the interest which the Administrator hath in the Lands out of which the Rent is

An *Indebitatus* generally is not good to create a Debt, but there must be something else made appear to the Court to make a Debt to be due to the party that brings an Action of Debt, or else the Action will not lye; for he must shew for what he was debted, and for how much, so that the Court may judge, whether the Debt for which he declares, may be lawfully sued for in that Action. *Mich. 22. Car. B. r. For else to declare upon an Indebitatus as-umpsit, is no more than if the parties declared upon a nudum pactum.*

An Action of Debt doth lie for a Councillor, or for an Atturney for their Fees against the party that retained them. *Mich. 22. Car. B. r. Q. Whether it lie for Councillor, for his Fee, is honorarium Quiddam, and not mercenarium, a Gratuity rather than Wages or a salary. By Rolle Chief Justice. But if it be upon a special retainer, I conceive an Action will without all doubt lie for a Councillor.*

An Action of Debt doth lie upon a perfect Contract in Law betwixt the parties, and so doth an Action upon the Case. *22. Car. B. r. Q. Which is its nature, only like a Bill in Chancery, setting forth a particular Case, and praying a general and an equitable remedy, where the Law gives not a particular one.*

An Action of Debt brought against an Executor, for Rent grown due in the time of the Executor, ought to be brought in the detinet and debet. *Hill. Car. B. r. So then said to be adjudged in Royton and Mees Case. But if the Action be brought for Rent due in the life of the Testator, the Action ought to be brought in the detinet only; for then it cannot be said it was owing to the Executor, because it was owing to the Testator*

*Testator in his life time, but it may properly be said to be detained from the executor, because he is intitled by Law to receive it; but if the rent grow due in the time of the Executor, then it may be said to be both owing, and also detained from him. Q. de hoc: and vide Hen. 4. 2. 1. 2. 3. 4. 5. 6. 7. 8. 9. 10. 11. 12. 13. 14. 15. 16. 17. 18. 19. 20. 21. 22. 23. 24. 25. 26. 27. 28. 29. 30. 31. 32. 33. 34. 35. 36. 37. 38. 39. 40. 41. 42. 43. 44. 45. 46. 47. 48. 49. 50. 51. 52. 53. 54. 55. 56. 57. 58. 59. 60. 61. 62. 63. 64. 65. 66. 67. 68. 69. 70. 71. 72. 73. 74. 75. 76. 77. 78. 79. 80. 81. 82. 83. 84. 85. 86. 87. 88. 89. 90. 91. 92. 93. 94. 95. 96. 97. 98. 99. 100. 101. 102. 103. 104. 105. 106. 107. 108. 109. 110. 111. 112. 113. 114. 115. 116. 117. 118. 119. 120. 121. 122. 123. 124. 125. 126. 127. 128. 129. 130. 131. 132. 133. 134. 135. 136. 137. 138. 139. 140. 141. 142. 143. 144. 145. 146. 147. 148. 149. 150. 151. 152. 153. 154. 155. 156. 157. 158. 159. 160. 161. 162. 163. 164. 165. 166. 167. 168. 169. 170. 171. 172. 173. 174. 175. 176. 177. 178. 179. 180. 181. 182. 183. 184. 185. 186. 187. 188. 189. 190. 191. 192. 193. 194. 195. 196. 197. 198. 199. 200. 201. 202. 203. 204. 205. 206. 207. 208. 209. 210. 211. 212. 213. 214. 215. 216. 217. 218. 219. 220. 221. 222. 223. 224. 225. 226. 227. 228. 229. 230. 231. 232. 233. 234. 235. 236. 237. 238. 239. 240. 241. 242. 243. 244. 245. 246. 247. 248. 249. 250. 251. 252. 253. 254. 255. 256. 257. 258. 259. 260. 261. 262. 263. 264. 265. 266. 267. 268. 269. 270. 271. 272. 273. 274. 275. 276. 277. 278. 279. 280. 281. 282. 283. 284. 285. 286. 287. 288. 289. 290. 291. 292. 293. 294. 295. 296. 297. 298. 299. 300. 301. 302. 303. 304. 305. 306. 307. 308. 309. 310. 311. 312. 313. 314. 315. 316. 317. 318. 319. 320. 321. 322. 323. 324. 325. 326. 327. 328. 329. 330. 331. 332. 333. 334. 335. 336. 337. 338. 339. 340. 341. 342. 343. 344. 345. 346. 347. 348. 349. 350. 351. 352. 353. 354. 355. 356. 357. 358. 359. 360. 361. 362. 363. 364. 365. 366. 367. 368. 369. 370. 371. 372. 373. 374. 375. 376. 377. 378. 379. 380. 381. 382. 383. 384. 385. 386. 387. 388. 389. 390. 391. 392. 393. 394. 395. 396. 397. 398. 399. 400. 401. 402. 403. 404. 405. 406. 407. 408. 409. 410. 411. 412. 413. 414. 415. 416. 417. 418. 419. 420. 421. 422. 423. 424. 425. 426. 427. 428. 429. 430. 431. 432. 433. 434. 435. 436. 437. 438. 439. 440. 441. 442. 443. 444. 445. 446. 447. 448. 449. 450. 451. 452. 453. 454. 455. 456. 457. 458. 459. 460. 461. 462. 463. 464. 465. 466. 467. 468. 469. 470. 471. 472. 473. 474. 475. 476. 477. 478. 479. 480. 481. 482. 483. 484. 485. 486. 487. 488. 489. 490. 491. 492. 493. 494. 495. 496. 497. 498. 499. 500. 501. 502. 503. 504. 505. 506. 507. 508. 509. 510. 511. 512. 513. 514. 515. 516. 517. 518. 519. 520. 521. 522. 523. 524. 525. 526. 527. 528. 529. 530. 531. 532. 533. 534. 535. 536. 537. 538. 539. 540. 541. 542. 543. 544. 545. 546. 547. 548. 549. 550. 551. 552. 553. 554. 555. 556. 557. 558. 559. 560. 561. 562. 563. 564. 565. 566. 567. 568. 569. 570. 571. 572. 573. 574. 575. 576. 577. 578. 579. 580. 581. 582. 583. 584. 585. 586. 587. 588. 589. 590. 591. 592. 593. 594. 595. 596. 597. 598. 599. 600. 601. 602. 603. 604. 605. 606. 607. 608. 609. 610. 611. 612. 613. 614. 615. 616. 617. 618. 619. 620. 621. 622. 623. 624. 625. 626. 627. 628. 629. 630. 631. 632. 633. 634. 635. 636. 637. 638. 639. 640. 641. 642. 643. 644. 645. 646. 647. 648. 649. 650. 651. 652. 653. 654. 655. 656. 657. 658. 659. 660. 661. 662. 663. 664. 665. 666. 667. 668. 669. 670. 671. 672. 673. 674. 675. 676. 677. 678. 679. 680. 681. 682. 683. 684. 685. 686. 687. 688. 689. 690. 691. 692. 693. 694. 695. 696. 697. 698. 699. 700. 701. 702. 703. 704. 705. 706. 707. 708. 709. 710. 711. 712. 713. 714. 715. 716. 717. 718. 719. 720. 721. 722. 723. 724. 725. 726. 727. 728. 729. 730. 731. 732. 733. 734. 735. 736. 737. 738. 739. 740. 741. 742. 743. 744. 745. 746. 747. 748. 749. 750. 751. 752. 753. 754. 755. 756. 757. 758. 759. 760. 761. 762. 763. 764. 765. 766. 767. 768. 769. 770. 771. 772. 773. 774. 775. 776. 777. 778. 779. 780. 781. 782. 783. 784. 785. 786. 787. 788. 789. 790. 791. 792. 793. 794. 795. 796. 797. 798. 799. 800. 801. 802. 803. 804. 805. 806. 807. 808. 809. 810. 811. 812. 813. 814. 815. 816. 817. 818. 819. 820. 821. 822. 823. 824. 825. 826. 827. 828. 829. 830. 831. 832. 833. 834. 835. 836. 837. 838. 839. 840. 841. 842. 843. 844. 845. 846. 847. 848. 849. 850. 851. 852. 853. 854. 855. 856. 857. 858. 859. 860. 861. 862. 863. 864. 865. 866. 867. 868. 869. 870. 871. 872. 873. 874. 875. 876. 877. 878. 879. 880. 881. 882. 883. 884. 885. 886. 887. 888. 889. 890. 891. 892. 893. 894. 895. 896. 897. 898. 899. 900. 901. 902. 903. 904. 905. 906. 907. 908. 909. 910. 911. 912. 913. 914. 915. 916. 917. 918. 919. 920. 921. 922. 923. 924. 925. 926. 927. 928. 929. 930. 931. 932. 933. 934. 935. 936. 937. 938. 939. 940. 941. 942. 943. 944. 945. 946. 947. 948. 949. 950. 951. 952. 953. 954. 955. 956. 957. 958. 959. 960. 961. 962. 963. 964. 965. 966. 967. 968. 969. 970. 971. 972. 973. 974. 975. 976. 977. 978. 979. 980. 981. 982. 983. 984. 985. 986. 987. 988. 989. 990. 991. 992. 993. 994. 995. 996. 997. 998. 999. 1000.*

An Action of Debt lies against the Mareschal of the Kings Bench for suffering a prisoner in execution, to go into the Country with a keeper, to return at certain day. *Dyer. 278.*

So is it upon any escape, against him, or any other Gaoler. *1. R. 2. 12. Com. 36.*

Where a certain sum of money is to be paid upon an Obligation at several daies of payment, expressed in the Condition of the Obligation, though the money be not paid accordingly, yet an Action of Debt cannot be brought for any part of this money until all the days of payment expressed in the Obligation be past. *Pasc. 24. Car. B. r.* Because the penalty of the Obligation, which is an entire thing, and cannot be apportioned, is to be recovered which is not wholly due until the whole Condition be broken, which is not so until the party fail in the last day of payment.

But I take the Law to be otherwise in Case of an Obligation with Condition, or in Case of a penal Bill, for it is a Rule in Law, That a penalty cannot be once forfeited: and it will not be denied, but that upon the first non-payment, there is a breach of the Condition; Ergo, there is a forfeiture by the one breach, of the whole Obligation: but in Case of a single Bill, it is otherwise, *causa patet.* And I take the intent of the books to be, which treat of this matter.

If one deliver necessaries to an Infant, viz. meat, drink, or cloaths, and he promise to pay for them, an Action of Debt will lie against the Infant upon his promise if he perform it not, but to this Action *fra etatem* is a good Plea, and the Plaintiff shall thereupon put to prove the particulars, and that they were necessary. But if the party come to an account with the Infant for what is due unto him from the Infant, and thereby doth state the sum due unto him, an Action of Debt doth not lie against the Infant for the moneys stated to be due to the party upon this account. *For the Infant can never be prejudiced by such a promise, if it be proved, as it must be upon the tryal, that the Infant had such necessaries, and that they were reasonably worth to be promised to pay for them, and therefore it is but justice that he should be compelled to pay for them. But where the Infant and the party account the Infant may be over-reached in the account, and therefore the law which protects Infants will not compel him to the Debt stated upon the account.* Trin. 24. Car.

If a woman sole be indebted, and then take a husband, the Debt is now thereby become the Debt of husband and of the wife; that is to say, the wives per Debt, and the husbands Debt in the right of wife, and the wife ought to be sued for this Debt either with her husband, and if the husband dye, thereby the Action is abated, yet the wife may be sued again for this Debt. Trin. 24. Car. B. r. *For the death of the husband doth not extinguish the Debt, but only abate the Writ.*

Judgement was Reversed in this Court by a writ of Error, because it was given to recover a Le-

*gacy. Trin. 24. Car. B. r. For a Legacy is not recoverable at the Common Law, but in the Ecclesiastical Court, or the Chancery.*

An Action of Debt doth not lie upon a Judgement given in this Court after the Record thereof is removed by a Writ of Error out of this Court into the Exchequer Chamber. *Trin. 23. Car. B. r. It is held otherwise at this day, because the transcript only, and not the Record itself is removed.*

An Action of Debt doth not lie against an Executor which is grounded upon a simple contract made by the Testator. *Hill. 1649. Jan. 31. B. r. Because the Executor is not privy to such contract and so knows not how to plead to such an Action or wage his Law ; but an Indebitatus assumpsit will lie.*

An Action of Debt doth lie against a Gaoler suffering a Prisoner in Execution to escape, by the party at whose Suit the Prisoner was committed to Execution ; for upon the escape the Law makes the Gaoler a Debtor to him whose Prisoner is suffered to escape. *Trin. 1650. B. r. 15. Junii. Or an Action in the Case to recover his damages suffered by the escape.*

One may bring an Action of Debt for Rent in what County he pleaseth. *9. Nov. 1650. B. r. because it sounds not in the Realty. Q. tamen hoc.*

If a judgement be given for the Plaintiff, in an Action of Debt in the Common Pleas, and afterwards the transcript of the Record is removed out of this Court by a Writ of Error, yet the Plaintiff, to whom the Judgement was there given, may bring an Action of Debt there, upon that Judgement, because the Record of the judgment is not removed.

only the transcript or Copy of it, so that notwithstanding the Writ of Error, and removing the transcript, they have the Record of the judgment there ground the Action upon: but if the Judgment be reversed in this Court upon the Writ of Error, and after the party proceed in the Common Pleas in an Action of Debt, the party against whom he thus proceeds, may bring his *Audita Querela* to be relieved against this Action. 3. Feb. 1650. B. S. For by reversal of Judgement the ground of the second Action is destroyed, and so the Defendant is wrongfully vexed by such prosecution, for which an *Audita Querela* doth

One may joyn two Debts due upon two several obligations, from the same party in one Action of Debt. 6. Feb. 1650. B. S. And declare in one Declaration the several Obligations. For there is no prejudice to the Defendant by doing it, but rather a favour, in saving him expences.

By Glyn Chief Justice. Trin. 1658. Where the Gaoler doth suffer a prisoner for Debt to escape voluntarily, and wilfully, there cannot be an Action brought in for the same Debt against the prisoner; for where the Gaoler is lyable for the Debt. But it is otherwise where the escape is suffered by negligence.

If one do deliver goods to I. S. to my use, if the party to whom they were delivered, do refuse to deliver them unto me, I may either have an Action of Debt or an Action of Accompt for them, against him whom they were delivered at my election. 22. Apr. B. S. For the delivery of them to my use, doth vest property of them to me.



## Deeds.

Such construction ought to be made of a Deed that it may agree with the intent of the parties to the Deed, if their intent do not contradict the Rule of Law. *Hill. 22. Car. B. r. And that their intent may be known by the Deed.*

A Deed of Indenture made betwixt two, ought to be Sealed and Delivered by both parties to the Indentures, otherwise it cannot be said to be a Deed indented. *Trin. 23. Car. B. r. For though it be called an indenture from the indenting of it, yet that indenture doth suppose it to be made at least betwixt two parties, and ought to seal and deliver the several parts, or else it cannot work as an indenture, though if but one part be sealed it may sometimes work as a Deed-Poll to barr the party that sealed it.*

If all the parts of a Deed may by Law stand together, no one part of that Deed shall be so interpreted as to make either the whole Deed or any part of it to be void. *Pasc. 24. Car. B. r. For it would be a comment to destroy the text, and not to explain it.*

A Deed cannot be delivered as an escrow to the party himself, who is to take by the Deed. *Trin. 1650. Car. B. r. Trin. B. S. For the delivery of it to the party, who is to take by the Deed, makes it the party's Deed who delivered it, and so it must work upon the deliverers of it.*

If a Deed do say, *This Indenture made*, whereas the Deed is indented, yet it may be a good Deed for some effects, for it may work as a Deed-Poll, though it cannot work as an indenture.

If it do not appear by the Fabrick of a Deed, that  
lands do pass by the Deed, by way of Feoffment ;  
the Land may pass by it by way of use if there be  
consideration, which is sufficient in Law to raise  
use expressed in the Deed. For if a Deed can by  
construction of Law be construed to have any Legal  
operation, the Law will not make it utterly void though  
it cannot operate as the Fabrick of the Deed purports  
should.

*Ejement.*

one seal a Lease of Ejectment to try a title of Land, it is not necessary to give notice of the giving of this Lease unto him whose title is concerned; but it is sufficient to give notice of the Lease to the Lessor or Undertenant of the Land in question. *Hill. Car. B. r.* For the possession of the Land is primarily in question in this Action, and is to be recovered and not the title of the Land, which possession doth properly concern the Tenant of the Land, be the title in whom it is; though the title of the Land doth also come in question and is tried collaterally. But now by the way of practice, it is not usual to Seal any Lease of Ejectment at all in an Action of Trespass and Ejectment, but the Plaintiff that intends to try the title, delivers a Declaration to an Ejector of his own making, that Ejector sends or delivers the Declaration to the Tenant in possession, who gives notice thereof to the Lessor, whose title is concerned to defend the title, if neither the Tenant in possession, nor his Lessor defend the title, then the Ejector will confess a

169 Judgement to the Plaintiff; and so the Tenant will be stripped out of possession, but if they or either of them will defend the title, then it is usual for them to move the Court that they may be made Ejector to defend the title, which the Court will grant if they will Confess Lease, Entry, and Ouster, at the tryal, and stand merely upon the title; and if at the tryal they do not, then Judgement to be entred against the Plaintiff as ejector.

If one do occupy the Lands in question in an action of Trespass and Ejectment, after the Ejectment Lease made to try the title of the Land is Sealed; this is an Ejectment in Law of the Lands in question. *Trin. 22. Car. B. r.* For the keeping of possession of the Lands against him to whom they are by the Lease doth amount to an Entry upon him, though he to whom the Ejectment was made by virtue of Lease, nota, was never in possession of the Land.

If there be two Ejectors made in an ejectment *firmæ*, one of them may be found guilty of the Trespass and Ejectment; and the other, as the case may fall out, may be acquitted. *Trin. 22. Car. B. r.* And yet the Action is well brought, because there is a Trespass and Ejectment found against one of the Defendants.

An Ejector in Law, is any person that comes upon any part of the Land, &c. in the Ejectment Lease, though it be by chance, and with no intent to disturb the Lessee of the possession, next after the Sealing and Delivery of the Ejectment Lease; and such an Ejector is a good Ejector, to bring an Action of ejectment *firmæ* against, to try the title of the Land in question. *Mich. 22. Car. B. r. 1650, B. S.* And the

considerable prejudice to any person by having such Ejector; but it is suffered for the more speedy dispatch of justice.

He that is to try a title of Land by an Action of trespass and Ejectment, ought not to make an Ejector of his own against whom he may bring his Action, or to consent, or agree with one to come up to the Land let in the Ejectment Lease, with an intent to make him an Ejector, and to bring his Action against him. *Mich. 22. Car. B. r. For by that means the tenant in possession of the Land, was often put out of possession, by a Writ of habere facias possessionem, without notice given either to him or his Lessor of the Suit. But this is altered by the new way of practice formerly mentioned. Q. in which way there may prove the greater conveniences.*

In every *ejectione firmæ*, the Plaintiff ought to set forth in his Declaration, in what Parish the Lands in question do lye, that the *venue* may be from the place where the Lands do lie, and not from the body of the County, except it be when as the Lands in question do not lie in any Vill or Hamlet. *Mich. 22. Car. B. r. Cuius Conus, for in all such causes, it is of necessity that the Jury be of the body of the County, because there is not any other more particular and certain place from whence the venue may come.*

If one declare upon a Lease, in an *ejectione firmæ*, and that by vertue of that Lease, he was in possession of the Lands thereby let unto him, until that he was ejected by the Defendant, it is supposed that the Lessor that made the Lease unto him, was alive at the time when he brought his Action. *Mich. 22. Car. B. r. Otherwise the Lessee might have no cause of Action for the Lease might possibly be determined by the death of the Lessor.*

An Ejectment or an Ouster, is either an actual ejectment, as when the Lessee is actually put out of the Land let unto him, or else it is an Ejectment by implication of Law, viz. where such an act is done by one which doth amount to an Ejectment, though he do not really enter upon the Land let, and oust the Lessor. *Pasc. 22. Car. B. r.*

An *ejectione firmæ* ought to be brought for a thing that is certain, and not of an uncertain thing. *Pasc. 23. Car. B. r.* For if the thing be uncertain, the Plaintiff cannot if the Plaintiff recover, know of what to deliver the possession upon the Writ of *habere facias possessionem*, and consequently there can be no fruit of such an Action, which the Law doth alwaies labour to prevent.

If the Plaintiff in an *ejectione firmæ*, do declare for a house lying in two Parishes, if the house do lye in either of the Parishes, and do not lye in both of them, yet is the Declaration good. *Pasc. 23. Car. B. r.* For the certainty enough in it. *Q.*

Although in an *ejectione firmæ* there be a Verdict and a Judgement against the Plaintiff, yet the Plaintiff may bring another Action of Trespass and Ejectment for the Land. *Trin. 23. Car. B. r.* He may bring divers Actions one after another if he please, for the Judgement in that Action is not final, for it is but to recover the possession of the Land, and is not like an *assize*, or a Writ of right, &c. wherein the title of the Land is primarily concerned.

By Rolfe Chief Justice, It is doubtful whether an *ejectione firmæ* do lie de *uno crofto*. *Trin. 23. Car. B. r.* For the incertainty of the word Croft, what it is, and what it doth contain. *Q.*

If a Lease of Ejectment to try the title of Land

the possession of *I. S.* be made to one, and after the Lease is made, the Wife of *I. S.* or the servant of *I. S.* do keep the possession of the Land for *I. S.* and *I. S.* do after this occupy the Land, *I. S.* is an Ejector against whom an Action may be brought to try the title of the Land. *Mick. 23. Car. B. r. Pasc. 24. Car. B. r.* For *I. S.* his occupation of the Land after the possession of thereof kept by his wife or servant doth imply that the possession thereof was kept for him, and by his direction, and they were but his instruments, and were to gain nothing by keeping the possession.

One who hath title to the Land in question in an *ejectioe firme*, may upon motion to the Court be made a party to the Action, that he may thereby defend his title, if he will confess the Lease, Entry, and *Qufter Hill. 23. Car. B. S. Vid. supra.* According to the new way of practice.

If a Lease of Ejectment be made of a house and lands, occupied with it, to try the title of them, and the Wife of the occupyer of the house and land continue in possession of the house, after the Ejectment Lease is made, she is an Ejector, as to the house, but not as to the Lands. *Pasc. 1652.* For there may be divers Ejectments upon one Lease:

He who is in any part of a Messuage, viz. in the Barn, Stable, Stall, &c. after the Lease of Ejectment Sealed and Delivered to try the title of the Messuage, is an Ejector for the whole Messuage. *Pasc. 24. Car. B. r.* For a Messuage is an entire thing, and is not to be recovered per partes.

The present owner of the Land may consent with the party that claims the Land to make an Ejector to try the title of it, if it be not a plot betwixt him and



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and the Ejector. Mich. 24. Car. B. r. viz. To strip the Tenant of the Land in possession, out of his possession of it ; for the Law doth not countenance fraud.

If divers persons come together upon the Land in question, next after the Ejectment Lease, to try the title of the Land, is Sealed and Delivered ; it is in the election of the Plaintiff that intends to try the title, to bring his Action against all of them, or against which of them he pleaseth. 1650. B. S. For if the Plaintiff have right, they be all Trespassors, and it is no wrong to bring the Action against any of them.

If a Lease of Ejectment be made to one to try a title of a house, and the Lessee to whom the Lease is made, go into the Entry of the house, to make his Entry by vertue of the Lease, and one that is in the house shut an inner door of the house, and keep the Lessee out of an inner room of the house ; this is not an Ejectment, nor is that person such an Ejector that an Action may be brought against. Mich. 1650. B. S. For when he is entred in at the door of the house, he is in possession of the house, and is not Ejected out of it, though he have not possession of the whole house ; for the Ejectment must be of the whole thing for which the Action is brought.

169. An *ejectione firmæ* doth not lie of a close of land without expressing either the name or the nature of the Land. Hill. 1649. 30. Jan. B. S. Because it is not known certainly what is meant by a Close without some description of it, either by its name or nature. It was then said an *ejectione firmæ*, doth lie of a Croft of Land, sed Quia for it was formerly doubted.

If one seal a Lease of Ejectment, and do thereupon

*ffra Vicariz palæon Church 1649.*

on give his Lessee possession of the Lands let, and the Lessee is not ejected at that time, the Lessee may enter into the Lands again at another time by vertue of his former entry and possession; and if the Lessee be then Ejected, he may bring an Action of Trespass and Ejectment upon this Ejectment. *Pasc. 1650. B.S. 10. Maii.*

An Ejectione firme doth lye of a Cottage. *Pasc. 1650. 12. Maii.* For it is a word of a certain signification.

*How can I find out now if it be to lease or to sell. See the 10th of Henry 6th. 149.*  
Evidence.

In an Action upon the Statute of Hue and Cry brought by one Oliver a Carrier against the Hundred of Wallington in Surrey: Oliver who was robbed, was admitted by the Court to give Evidence to the Jury to prove he was robbed, and the place where.

The Allegation of the Counsel at the Bar, is no Evidence to the Jury, but the matter which ensues upon this Allegation, to prove it is good Evidence upon a tryal at the Bar. *Mich. 22. Car. B. r.* For Evidence to a Jury ought to be given upon the oaths of Witnesses, or upon matters of Record, or by Deeds proved, and other like authentical matter; but the allegation of the Counsel is oftentimes but what they apprehend fit to be spoken for the best Advantage of their Clients Cause, and not according to the truth of the fact.

Witnesses who are to be made use of, to give their Testimony at a tryal at the Barr, if by reason of sickness or otherwaies are not able to travel and come to the tryal, may by order of the Court be examined

amined upon Oath touching their knowledge, in the Country where they live ; and their Depositions so taken are to be admitted to be read as Evidence to the Jury at the tryal. *Mich. 22. Car. B. r. But otherwise, this is not admitted to be done, because it is accompted the best and fairest way to find out the truth to examine them in Court before the Judge before whom the tryal is, and in the presence of the Counsel on both sides.*

Depositions taken in Chancery, may by order of the Court be read as Evidence to a Jury upon a tryal at the Bar by the Plaintiff, or the Defendant, or both, if the Depositions were taken in the cause which is to be tryed at the Bar, and between the same parties that are Plaintiff and Defendant in the tryal. *Mich. 22. Car. B. r. And so it is of Bills, Answers, Replications, &c. in Chancery.*

But if the parties that Deposed in Chancery be living at the time of the tryal, they ought to be examined *ore tenus* in Court, and their Depositions are not in such case to be made use of. *Pasc. 1650, B. S. For the reason aforesaid.*

The admittance of one to be an Administrator in an inferior Diocess, is a Bar against the person that doth so admit him to give Evidence at a tryal, that the Intestate had not *bona notabilia* in divers Diocesses at the time of his death. *Mich. 22. Car. B. r. For such Evidence would be contrary to what he hath formerly admitted, and so it would be to suffer the party to disprove by others what he hath already himself granted.*

The Court will not permit the Jury upon a tryal at the Bar, to carry any Writings with them out of the Court, as Evidence for them to consider of, but

But such as are under Seal, and have been proved in Court. *Mich. 22. Car. B. r.* For others are of no credit and are no part of the Evidence which they are so considered upon.

An Evidence given to a Jury, may be answered by the Counsel, either by confessing and avoiding it, or else by encountering the Evidence given, with giving stronger Evidence and of greater credit on the other side. *Mich. 22. Car. B. r.* Which is upon the matter a denial of the Evidence given on the other side to be true by proving the contrary.

A thing which is concluded in the Ecclesiastical Court which doth concern Lands, is not to be given in Evidence to a Jury at a tryal concerning those Lands. *Mich. 22. Car. B. r.* For the Courts of Common Law are not to be guided by their proceedings, nor are they to be urged to a Jury in Evidence to sway their consciences.

A person that may be admitted as a Witness, at a tryal may give words in Evidence to the Jury which were spoken to him by another person, who by the Rules of the Court might not be admitted as a Witness at the tryal. *Mich. 22. Car. B. r.* For it is but matter of Evidence, and is left to the Jury how far they will give credit to them, and it is lawful for one that is admitted as a Witness to give anything in evidence which may concern the matter in question.

It is not of necessity that a Deed or a Record given in Evidence to a Jury, be shewed in Court; but if it be proved that there was such a Deed, or such a Record as are given in Evidence, it is sufficient. *Trin. 23. Car. B. r.* For a Deed or a Record may be imbezled or lost, and so not to be produced; but in such a case the Tenour of the Record must be punctually proved by a

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true Copy thereof sworn unto by one which examined who is likewise to give an account when he delivers his Evidence where the Record is.

The Judges of the Court cannot try a matter of Fact in question, upon a Demurrer to an Evidence and therefore the Plaintiff and the Defendant must agree upon it and confess it. *Trin. 23. Car. B. R.* For else the Court will not proceed to deliver their opinions touching the matter in Law demurred upon; because if the matter of fact be not agreed, there can be no judgment given in the cause, which way soever the matter in Law fall out to be.

Matter in Law ought not to be given in Evidence at a tryal, but only matter of Fact is to be given in Evidence; and the matter in Law, if there be any that is disputable, is to be reserved to be spoken to in Arrest of Judgment, or are to be found specially. *Trin. 23. Car. B. R.* For the Jury are only to try matters of fact.

If a Fem Covert acknowledge a thing at a tryal which is for the present advantage of her Husband, but is for her own future disadvantage, yet this is no good Evidence to a Jury. *Mich. 23. Car. B. R.* For her Husbands present advantage, is Hers also so, and is more looked upon than her future disadvantage.

*Nota :* A Fem Covert shall not be admitted to be a Witness for or against her Husband, and so it was resolved in the Chequer Chamber in Sir James Crofts Case, in *Cov. Litt.*

The Defendants Council ought to conclude by way of answer to the Evidence that was given unto the Jury by the Plaintiffs Council. *Pasc. 24. Car. B. R.* For if the Plaintiffs Council doth begin the Evidence



his reason the Defendant should speak in answer to that Evidence, because he is upon the defensive part, and is to give an answer to all that is said against him in matter of Evidence, but the Plaintiffs Council after this, is to sum up his Evidence to the Jury, which is no more, than to put them in mind how he hath proved his cause.

An ancient writing that is proved to have been found amongst Deeds and Evidences of Land may be given in Evidence to a Jury, although the executing of it cannot be proved. Mich. 24. Car. B. r. For it is very hard to prove things that are very ancient, and the finding it in such a place, is a presumption, that it was preserved as a thing of value and to be made use of, and it is left to the Jury what credit they will give to it according to circumstances.

A writing that is permitted to be read, to prove one part of an Evidence given to a Jury, may be read to prove any other part of the whole evidence to be given. Mich. 24. Car. B. r. For it is but to make the whole truth of the cause appear.

If the Plaintiff or Defendant will give some part of an answer in Chancery in Evidence to a Jury, the Court may order that the whole answer be read. Mich. 24. Car. B. r. That the Court and the Jury may the better consider what it makes to the Evidence, and it may be if part only be read, it may prove good Evidence for the party, whereas the whole answer taken together may be against him, and so by reading of part the truth may be discovered.

He that takes out a Copy of part of a Record, 470. + out of any Office, with intent to give the Copy in Evidence in a Jury, must take out so much of the Record, at least, as doth any wayes concern the matter



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ter in question at the tryal, or else the Court will not suffer such Copy to be read in Evidence to the Jury. *Pasc. 1650. 2. Maii. B.r.* For if it be not so taken out, it cannot be sworn to be a true Copy of so much of the Record as concerns the matter in question, which is to be done before it can be read ; for the Record is to be taken with relation had to each part of it as they stand together to make up the whole Record, and if any part be left out, a right Judgement cannot be given upon the Record.

A transcript of a Record which is in another Court, or an Enrolment of a Deed may be given in Evidence to a Jury. *Mich. 1649. B. S.* For they are things to be credited, being made by Officers of trust, who shall not be presumed to do false things.

174. Upon a tryal at the Bar, the Council of that party who doth begin to maintain the issue, that is, to be tryed whether it be the Council of the Plaintiff or the Council of the Defendant ought to conclude the Evidence. *Pasc. 1650. 1. Maii. B. S.* That is, one sum up his Evidence given ; but if he give new Evidence, the other party hath liberty to answer it or encounter it with other Evidence.

If any one of the Jury that is sworn to try the Issue, be desired to give his Testimony concerning some matter of Fact that lies in his particular knowledge, and concerns the matter in question as Evidence, to his fellow Jurors, the Court will have him examined openly in Court upon his Oath, touching his knowledge therein, and he is not to deliver his Testimony in private unto his fellow Jurors. *31. Oct. 1650. Mich. B. S.* For the Court and Council on both parts, are to hear the Evidence given on either

side as well as the Jury ; that it may be answer-  
ed by the other party if need require, and that the  
Court may direct the Jury to find according to the  
Evidence.

*Memorandum* : At a tryal at the Bar, between Bax-  
ter and Foster, concerning the title of Land, a Co-  
py of an inscription upon a great stone in London  
was admitted in Evidence to prove a pedigree. *Mich.*  
1656. B. S.

In the case of *Miller* Plaintiff, and *Collumbine* De-  
fendant, upon a tryal at the Bar, in an Action of  
Trespas and Ejectment. It was said by Rolle Chief  
Justice, That an Office which is found after the death  
of one that died Seised of Capite Lands, in a County  
wherein the Lands found in that Office, do not lie, but in  
another County, may notwithstanding it was not found in  
the County where the Lands do lie, be given in Evidence  
to a Jury that is to try the title of these Lands, if there  
was a special Livery granted unto the Heir of those  
Lands. 1654. B. S. For this presumes there was a  
special direction for finding this Office in this extraor-  
dinary way.

The Plaintiff or the Defendant may make an Affi-  
davit in there own cause depending here, and it may  
be filed ; but it may not be admitted in Evidence of  
the tryal of the cause betwixt them. *Mich.* 1656. B. S.

The Jury may view Depositions taken in Chance-  
ry, if they be exemplified under the great Seal, and  
they may also have them with them from the Bar, to  
consider of as part of the Evidence ; but if they be  
not exemplified under the great Seal, they may only  
look upon them at the Bar, but not have them with  
them out of the Court. 1655. B. S. For they are  
not so authentical if they be not exemplified under

*Seal : for the seal gives them the Testimony of the Court of Chancery it self that they are true, but without exemplification, they pass only upon the credit of the examiner, who is but an Officer in Court.*

If one do produce a Lease made upon an Out-lawry, in Evidence to a Jury to prove a title ; he must also produce the Out-lawry it self ; for the Out-lawry is the ground of the Lease, and by consequence the title which is to be proved : but if he produce the Lease to prove other matter, he needs not to shew the Out-lawry, but may have the Lease only read in Evidence, but in both cases he must prove the Lease, so it is of an extent without shewing the Statute or Judgment on which the extent is grounded. So held in a tryal at the Bar between *Johnson and Spencer* *Pase. 1655. B. S.*

In a tryal at the Bar in a Trespass and Ejectment between *Williams and Scot*, It was said by Chief Justice, That an entry in an *Heralds Book* is no good Evidence to prove a pedigree to prove one to be heir to the Land in question ; for they are matters of Record.

#### *Emparlance.*

If the Plaintiff do amend his Declaration at any time after it is delivered to the Defendants Attorneys or after it is filed in the Office in any thing that is a matter of substance, the Defendant may by the Rule of the Court, Emparle to the next Term after the Declaration is so amended, if the Plaintiff do not pay costs to the Defendant for his amendment, but if the Defendant do accept of costs of the Plaintiff, then the Defendant cannot Emparle. *Mich.*

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*Car. B. r.* For by such amendment, it shall be accepted as a new Declaration; but if the Defendant accept of costs for such amendment, it is intended that he is satisfied for what he is prejudiced by the amendment, and therefore it is reason he should plead to the Declaration so amended, and not *Imparle*.

In what Term soever a declaration comes in against the Defendant, the Defendant may by the Rules of the Court *Emparle* to the next Term after, before he can be compelled to plead. *Mich. 22. Car. r.* For the Law doth not force any one to do any thing *holly and without advice, but gives the party time to deliberate what to answer for himself.*

Where the Defendants Case doth necessitate him to plead a special Plea, and the matter is difficult which is to be pleaded; the Court upon a motion made to inform them of it, will, if the Defendant desire it, grant him longer time to *Emparle* and put in his plea, than otherwise by the Rules of the Court he ought to have. *Hill. 22. Car. B. r.* But without a motion leave of the Court he cannot take time to plead, because the Court is to judge whether it be necessary to plead a Plea, as requires longer time to consider of than ordinary, and should it be otherwise, the Defendant might upon such pretences delay the Plaintiff without cause.

Where the Plaintiff doth keep any Deed or Writing, or other thing from the Defendant, which doth hang unto him, and whereby he is to make his defence, and is disabled by the detaining thereof to plead for his best advantage; the Court upon motion and information thereof, will grant an *Imparle* to the Defendant, until the Plaintiff do deliver

it unto him, and a convenient time after, till he draw up his Plea. *Hill. 22. Car. B. r. For the Law* give every Defendant convenient time to make his best defence; and in this case, if the Defendant be delayed, shall be adjudged his own fault.

Upon a motion for an Emparlane in a case between *Aire and Goodwin. Mich. 1656. B. S.* It was said by Chief Justice, That if a Clerk of this Court do sue another, the Defendant cannot Emparle, but must plead presently, and so it is, if a Clerk of this Court sued he cannot Imparle, but must plead presently.

Also in all cases where the Plaintiff in his Declaration, or the Defendant in his Plea alledgeth a profit in Curia of the Deed or Administration, &c. there the Defendant shall not be forced to plead, nor the Plaintiff to reply until he hath seen the Deed or other evidence, and taken a Copy of it at his own costs if he pleaseth.

If the Plaintiff alter the venue from the place where he first laid it, the Defendant may Emparle to the next Term after. *Trin. 23. Car. B. r. For thereby he may be forced to alter his Plea, which may require time to consider of.*

If the Plaintiff do declare against the Defendant but doth not proceed further thereupon for the whole terms after, the Defendant may Emparle to the next Term by the Rules of the Court. *Hill. 23. Car. For by his delay, he might think the Plaintiff would proceed and may be thereby unprovided of a Plea.*

By Glyn Chief Justice. *Trin. 1656. B. S.* In the case of *Leonard and Osbalston*. It was said, That if the Defendant in Assault and Battery be Out-lawed, and come in upon the Out-lawry, and the Plaintiff declares against him, he shall not Emparle to the

arm, but must plead presently and go to tryal that  
 arm. *For he hath delayed the Plainiff already too much  
 standing out to the Out-lawry.*

If the Plaintiff amend his Declaration, and pay  
 costs to the Defendant, the Defendant may not Em-  
 parle, but if the Plaintiff give the Defendant a new  
 Declaration, or do so amend the old Declaration,  
 that is upon the matter a new Declaration, then the  
 Defendant may Emparle. *Mich. 1654. B. S. Causa  
 supra.*

By Rolle Chief Justice, if the Plaintiff and the De-  
 fendant have proceeded so far, as to Issue in the  
 Cause, and after the Defendant do amend his Plea,  
 the Defendant shall pay the Plaintiff Costs, because  
 the amending of the Plea after Issue, the Plaintiff  
 may be put to extraordinary Charges in new draw-  
 ing up the Issue; yet the Court will not grant an Em-  
 parance unto him, although the Cause be not en-  
 tered in the Judges book for tryal, if there be warn-  
 ing given to the Defendant of the tryal. *1655. B. S.  
 after Issue joyned, and warning given for a tryal up-  
 on that Issue, it is too late to Imparle.*

The Court would not grant the Defendant an Im-  
 parance, though he was sued upon an old Bond of  
 28. years old, and could not see the Bond; but  
 he must pray Oyer of it, and plead. In the Case of  
*Mr. Edward Johnson of the Inner Temple. Pasc.  
 1656. B. S. For the praying Oyer is the proper way to  
 have a sight of it, and to have a Copy of it, and till he  
 have Oyer, if he pray it, he need not plead, and the anti-  
 quity of the Bond is no cause of Imparance.*



## Executor.

If one be indebted to *I. S.* in a certain sum of money, and *I. S.* makes his Will, and deviseth this debt due unto him, unto *A. B.* and makes *I. L.* his Executor and dies; this debt devised unto *A. B.* must be paid unto *I. L.* the Executor, and not to *A. B.* the devisee. *Mich. 22. Car. B. r.* For the Executor and not the Devisee can give a sufficient discharge for this debt; and the Debt is part of the Testators estate for which the Executor only is responsible.

If a *Scire facias*, be brought against an Executor to shew cause why he should not pay a debt unto the Plaintiff recovered against the Testator; the Executor cannot plead fully Administred, but he must plead that no goods of the Testator are come to his hands whereby he might discharge the Debt. *Mich. 2. Car. B. r.* For he may have fully Administred, and yet be liable in Law to pay the Debt demanded upon the *Scire Facias*, viz. when goods of the Testators shall afterwards come to his hands.

An Executor which hath Administred goods of the Testator as Executor, or that is Executor of his own wrong, by disposing of the goods of the party deceased, without authority given unto him, cannot waive a term of years for Land, &c. of which the deceased dyed possessed of. *Mich. 23. Car. B. r.* For he hath charged himself to be answerable to all persons concerned, as far as the deceased parties personal estate amounts unto. But if the term will not be Assets, he may waive the term. *Trin. 24. Car. B. r.* For it is to no purpose to accept it.

An Executor of his own wrong, is not by Law chargeable.

argeable for more than the value of the goods of  
e deceased doth amount unto, and which did come  
to his hands, and with which he hath intermedled.

*Feb. 23. Car. B. r. Because he is not impowered by Law  
to recover any more of the estate, as an Executor authori-  
ty by the probate of a Will is.*

The word Executor, is a word collective, and  
comprehend in it, the Executor of an Execu-

*Hill. 23. Car. B. r. For he is accountable for the  
Testators goods, and is as it were his Executor  
of such goods as remain unadministred by the first Exe-  
cutor.*

An Executor may recover a duty which was due to  
the Testator, although the Executor was not named  
in the creation of that duty. *Trin. 22. Car. B. r. For he  
represents the very person of the Testator, and the Testa-  
tors estate belongs to him.*

An Executor may be charged upon a Collateral  
promise made unto the party by the Testator, if the  
promise was broken in the life time of the Testator,  
if not. *Mich. 149. B. S. And 16. April. 1650. B. S.  
by the breach of the promise there accrued a duty to  
whom the promise was made from the Testator, but  
before it is broken it is no duty.*

### *Endictment.*

An Endictment that is framed upon a Statute,  
ought to pursue the words of the Statute. *Trin. 23.  
Car. B. r. For such an Endictment is founded upon the  
statute only, and must not therefore swerve from it.*

The Justices of Assize will stay the proceedings  
upon an Endictment against a person for a thing  
done by him, during the time of war, and in relation

to the war. *Trin. 23. Car. B. r.* For Indictments are preferred against persons that do any thing in the disturbance of a peaceable and settled Government; but in time of War, there can be no such settled peace and Government.

If any one be perjured in an Affidavit made in a Court of Record, touching any cause depending in that Court, an Indictment may be preferred against him, for this is perjury upon the Statute of 5. Eliz. 29. *Trin. 23. Car. B. r.*

An Indictment of forcible Entry, doth not lie upon the Statute of 8. H. 6. against one for entering forcibly into a Copy-hold, for such estates are not mentioned in the Statute of 8. H. 6. nor are within the equitie of that Statute; but an Indictment doth lie in such a Case, by the Statute of 21. Jacob. 23. *Car. B. r.* For they are comprised within that Statute.

Although exceptions be taken against the Indictment, to the intent the Court should quash it, yet the Court will grant time to maintain the Indictment unto the Kings Council, if they desire it. *Hill. 23. Car. B. r.* For the maintenance of Indictments is for the good of the Common wealth, and the King is principally concerned in it.

The Court doth not usually quash Indictments for perjury, although the Indictments be faulty, but will put the party to plead to the Indictment. *Hill. 23. Car. B. r.* For perjury is counted a great offence, and therefore the Court doth not favour such offenders, and if the Indictments be not good, the parties Indicted may avoid them by pleading, and it is but ex gratia that the Court doth quash Indictments, and they are not bound to do it ex Officio.

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An Endictment ought to be more certain than common pleadings in Law need to be. *Hill. 23. Car. r. Because they are more penal, and ought to be more precisely answered unto.*

An Endictment ought to express the year of our Lord in which it was taken. *Hill. 1649. 30. Jan. B. r. For it ought to be certain in the time, as well as in other matters.*

If an Endictment be drawn so general and so uncertain, that the party Endicted cannot tell how to make a certain answer unto it, such an Endictment is not good, but may be quashed. *Pasc. 24. Car. B. r. For otherwise the Defendant would be ensnared there-*

If a word be left out in an Endictment, which is not only in matter of form, yet the Endictment is not good, but if it be in matter of substance it is not good. *Trin. 24. Car. B. r. For it is the substance of pleadings that is most regarded, though formality be not to be neglected.*

If one be Endicted for doing of any thing, for which he is not by the Law to be Endicted for, as for the enclosing of a Common, or some other Trespass for which an Action at the Common Law is to be brought ; such an Endictment is not good, but may be quashed. *Pasc. 24. Car. B. r. For Endictments are to be preferred for Criminal and not for Civil matters ; and then likewise the Delinquent is liable to be twice punished for one offence, which is against Magna Charta.*

If one do interrupt a long continued possession of lands by an unlawful means, and the person that is so interrupted of his possession, do regain his possession

on by unlawful means also, yet an Endictment of forcible entry doth not lye against him for doing thereof. *Mich. 24. Car.B.r. For the Law favours long possessions, and doth not countenance the disturbers of them, and this but vim vi repellere, which is not punishable in many cases.*

In most Cases the Endictment for a Fact done, ought to be laid in that County where that Fact was done ; for it shall be intended that there may the best conuance of the fact be had, and consequently the fairest tryal. But this holds not in all Cases. *Mich. 24. Car.B. r. And Mich. 25. Oct. 1650. B. r.*

If one be Endicted at the Sessions in London, or in any other County, and the party Endicted do remove the Endictment by a *Certiorari* into this Court, and do not thereupon quash the Endictment, the party that did remove it, ought by the Rules of the Court, to try the Endictment at his own costs the next Term after that the Indictment is removed. *For the removing of it is in favour of the Defendant, and he shall not by reason thereof be suffered to delay or put the prosecutor thereby to extraordinary charges.* *17. Nov. 1650.*

When an Endictment is special, that is, when it is grounded upon some special matter of fact, the Evidence given upon the tryal of this Endictment, must prove this special matter, and maintain the Endictment, but if it be a general Endictment, it is not so. *21. Car.B.r.*

An Endictment must be certain, that the party Endicted may know how to plead to it, or traverse, or else it is not good, but may be qualified, *Hill. 21. Car. B. r. Because there can be*

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*Tryal upon it, by reason of its uncertainty.*

An Endictment ought to be in Latin, or else it is not good, but may be quashed, except it be an Endictment taken before the Commissioners of Sewers, which may be in English. *Hill. 21. Car. B. r.*

The Parish in which the fact was done, for which the party is Endicted, ought to be named in the Endictment. *21. Car. B. r.* *That the party Endicted may be the plainlier described.*

An Endictment doth lye against one that speaketh blasphemous words. *21. Car. B. r.* *It lay then at the Common Law, but now by a late Act, it lies only for speaking of some blasphemous words named in that Act. But Q. Whether it now lie at the Common Law for speaking any other blasphemous words, not mentioned in the Statute. It seems it doth not.*

An Endictment for a nuisance doth lie against the owner or proprietor of a Ship that is sunk in a Haven or port. *21. Car. B. r.* *For thereby the trade of that place, where the Haven or that Port is, is bindred, and also navigation, which is prejudicial to the Common wealib; for it is chiefly maintained by navigation.*

An Endictment that is framed upon a Statute ought to pursue the words of the Statute, or else it is not good. *Mich. 22. Car. B. r.* *For the offence being made by the Statute, for which the party is Endicted, it is reason the Statute should be punctually recited, that it may plainly appear that the offence of the party Endicted is within the Statute.*

One that is convicted upon an erroneous Endictment cannot move after his Conviction to have the Endictment quashed, but must bring his Writ of Error to reverse the judgement given against him upon the



the Endiſtment. *Mich. 22. Car. B. r.* For after Judgment it is too late, for an Endiſtment is quaſhed for the inſufficiency in it, or becauſe no good Judgment can be given upon an erroneous Endiſtment ; but if Judgment be given upon an erroneous Endiſtment, it is good, till it be reverſed by a Writ of Error.

The Court will not quaſh an Endiſtment, that is preferred for the publick good, although it be not a good Endiſtment, but will put the party Endiſted to traverse it, or to plead unto it. *Mich. 22. Car. B. r.* For it is by the favour of the Court, that any Endiſtment is quaſhed, for if the Court pleaſe, they may force the the party to traverse or plead to any Endiſtment, be it good or bad, for it is no prejudice to the party Endiſted.

An Endiſtment removed by a Writ of Certiorari into this Court, may be ſent back again into the County or place, whence it was removed, if there be cauſe to do it. *Mich. 22. Car. B. r.* That there may be a tryal had upon it where it was firſt laid.

If an Action upon the Caſe be brought againſt one for calling another Thief, and the Defendant doth juſtifie the words, and upon the tryal it be found for the Defendant, an Endiſtment may be forthwith framed againſt the Plaintiff to try him for the Felony. So it was done in *Mich. 21. Regis nunc*, in the Caſe of one Perry, who was after executed at Tyburn. *Mich. 22. Car. B. r.* For the Felony appears to the Court by the Verdict found for the Defendant.

An Endiſtment doth lie againſt one that cheats another at play with falſe Dice. *Hill. 22. Car. B. r.* Or for any other way of cheating at play, or other wiſe ; For cheating is a high Crime againſt the Comm

Common Wealth, as well as against the party cheat-

An Endictment doth not lie for a private nuisance or other injuries, because the nuisance or injury done, is not made *ad commune nocumentum*, but *ad privatum*, and therefore an Action upon the Case doth only lye for the party that is damnified by this nuisance or injury. *Hill. 22. Car. B. r. 11. Maii. 1651.* For Endictments are to punish publik offences only, and done against the publik peace, and not to punish private Trespasses, for which the Law gives particular Actions.

An Endictment lies against one for assaulting and stopping of another in his passing in the Highway. *22. Hill. Car. B. r.* For it is a breach of the publik peace.

One that is Endicted for Felony, may have Counsel Assigned him to speak for him. *Pasc. 23. Car. B. r.* But such Counsel are only to speak for him in matter of Law, and not concerning matters of Fact, for that doth depend upon proof of Witnesses.

Although a Bill of Endictment be preferred to a grand Jury upon Oath, yet they are not bound to find the Bill, if they find cause to the contrary, and on the other side, although a Bill of Endictment be preferred unto them without Oath made, yet they may find the Bill if they see cause. *Pasc. 23. Car. B. r.* But it is not usual to prefer a Bill unto them, before Oath be first made in Court, that the evidence they are to give unto the grand Enquest to prove the Bill is true.

Every Endictment ought to be preferred against the party for some offence committed by him, either against the Common Law, or against some Statute.

*Trin.*

*Trin. 23. Car. B. r. And not for every slight misdemeanour.*

There ought to be fifteen dayes between the preferring of an Endictment and the convicting the party Endicted. *Trin. 23. Car. B. r. Q. In what cases, for I conceive it holds not in all.*

An Endictment lies against one that makes a false oath, in an answer to a Bill in Chancery, or in an Affidavit made in a cause depending there, or in any other Court of Record. *Trin. 23. Car. B. r. But Q. for what false oath made in an answer it lyeth, for it hath been held, that though the whole answer be not in all points true, yet an Endictment lies not, because answers in the Chancery are drawn by counsel, and not the party himself; but Affidavits are intended to be drawn up by the parties that make them.*

Where the party Endicted is Out-lawed upon the Endictment, the Court will not quash the Endictment, although it be erroneous, but will force the party Out-lawed, to bring his writ of Error to reverse the Out-lawry. *For before the Out-lawry reversed, the party Outlawed can have no benefit of the Law. Mich. 24. Car. B. r.*

An Endictment may be amended the same Term it is brought into the Court by the Clerk of the Peace, but the next Term after he cannot amend it. *Pasc. 24. Car. B. r. For though the Law will give way as much as is requisite for the maintaining of Endictments; because it is intended they are preferred pro bono publico, yet it will not permit that the party Endicted shall be unnecessarily delayed by the prosecutor, from coming to a just vindication of himself for the Crime for which he stands Endicted.*

If only a word of form be left out in an Endictment,

ment, yet the Endictment is good, but if one word of substance be omitted, the whole Endictment is naught. *Pasc. 24. Car. B. r.* For though the Law doth regard form in the proceedings thereof, yet it is matter of substance that is chiefly aimed at in all proceedings.

An Endictment of forcible entry, doth lye for a Tenant for years, who is forcibly put out of his possession. By the Statute of 21. *Jac. Pasc. 24. Car. B. r.* But before that Statute no such Endictment could lie.

Upon an Endictment preferred against one in the Kings Bench, there doth issue out an Attatchment against the party Endicted, to force him to appear to the Endictment. *Pasc. 1650. Maii B. S.* And to traverse or plead to it, or to move to have it quashed.

### *Exposition.*

The best Exposition of the Statute Law, is to be had by the consulting with the makers of them, and how they did in their times interpret them. *Hill. 23. Car. B. r.* For they knew best for what end they made the Statutes, and

*Contemporaria expositio legis est optima.*

The word *videlicet* in a Deed, is put to expound or make plain the premises of the Deed in which it is put, and not to destroy it or make it ambiguous; and therefore that which it brings in, ought not to be contrary to it, for if it be, the *videlicet* is void. *Pasc. 23. Car. B.* And the Deed shall be taken as if it were set out.

And all the words of a Deed can stand together without

out any absurdity, the Law will make such an Exposition of them, that the whole Deed may be good in Law. *Pasc. 24. Car. B. r. Because the sense of the parties to the Deed is collected out of the whole Deed ; Illud res magis valeat quam pereat.*

### *Election.*

An Action of Trespass upon the Case, or an Action of Trespass *vi & armis*, may be brought against one that doth rescue a Prisoner, at the Election of the party who is damnified by this rescuous. *Pasc. 24. Car. B. r. Yet the Judgements are different in these two Actions ; for in Trespass vi & armis, the judgement is entred with a capiatur pro fine, for the disturbance of the publick peace by the Rescuous ; but in bare Action on the Case, the judgement is entred, that the Defendant be in misericordia.*

Where one may bring an Action of Wast, for Trees cut down upon his Land, it is at his Election to bring an Action of Wast, or else an Action of Trover and Conversion for the Trees. For though it is best for his advantage to bring an Action of Wast ; yet he may waive that advantage if he please, for none is prejudiced thereby but himself. *Mich. 24. Car. B. r. But he cannot bring.*

An Action upon the Case, or an Assize, doth lye against him that doth surcharge a Common, at the Election of him that is injured thereby. *Mich. 16. B. S. For it is all one whether the Plaintiff recover any thing for which he sues, or damages for his prejudice suffered by the loss of it.*

If a Prisoner escape, that lies in prison upon execution ; an Action of Debt lyes against the Gaoler.

that suffered this escape, for the party at whose suit he was in execution; for the whole debt and damages for which the prisoner lay in execution, which is ascertained by the judgement: but if he were not a prisoner in execution, and do make an escape, it is in the Election of the party at whose suit he was a prisoner, either to bring an Action upon the Case, or an Action of Debt against the Gaoler for this escape. *An Action of Debt to declare against him, as he did, or might have done against the prisoner that escaped, in order to receive this Debt: or an Action upon the Case, to recover what damages he sustains by the escape suffered.* Trin. 1650. 15. Junii. B. r.

If the Plaintiff amend his Declaration, it is at his Election, either to pay the Defendant Costs for this amendment, or to give the Defendant an emparlance to the next Term after the amendment; and the Defendant cannot hinder this Election. 7. Feb. 1650. *For the Defendant is at no prejudice by it; because he is recompensed by the Costs, and therefore it is no reason that the Plaintiff should be delayed by an emparlance.*

*Est. ple.*

A recital in an Obligation is an Estopple, against which he that made the Obligation shall not be permitted to plead any thing to the Contrary, if an Action be brought against him upon this Obligation. 24. Car. B. r. *For that were to contradict his own Deed, and the recital shall be intended to be true, and not to be contradicted.*

If one enter into an Obligation by the title of an Esquire, whereas in truth he is a Knight; if an Action



be brought against him upon this Obligation, and he is named an Esquire, he shall be Ettopped to say in his Plea, that he was not an Esquire, but a Knight, at the time he entred into the Obligation, in abatement of the Writ. *Hill. 1649. B. S. For constat de persona that he was by his own admission the same person that entred into the Obligation; and did then admit the title of Esquire to be his true addition, and insisted not upon that he was a Knight.*

Where one hath liberty by Law, to confesse and avoid the matter which the Plaintiff doth set forth in his Declaration against him, there he cannot be Ettopped to plead such matter for his defence. *29. Jan. 1649. Hill. B.S. For this were to deprive him from the benefit of the Law.*

### *Extinguishment.*

If one have used to hold a Court by custom (as by Law he may) if he do afterwards purchase Letters Patents, to enable him to hold this Court; he hath thereby extinguished the Custom, and must not hold the Court by vertue of his Letters Patents. *Mich. 24. Car. B. r. For the party hath thereby waived the Custom, and hath made Election to hold the Court by another Authority, and both Authorities cannot stand together.*

### *Error.*

The want of a Bill, in the Kings Bench is Error, although the Plea Roll contains a Declaration; because the Bill is the Original Process there; and if there be a Bill, and the Defendant plead not to it,

after, yet all the continuances are entred upon the Bill, and when the Defendant pleads, then the Declaration is entred upon the Plea-Roll thus. *Et mo- ad hunc diem, scilicet diem, &c. isto eodem Termino, quem diem, dictus Defendens habuit licentiam ad illam predictam interloquendi, & hinc ad respondend' &c.*

If a Writ of Error be brought to reverse a Judgement, and afterwards this Writ of Error is discontinued for want of prosecution of the party; yet execution cannot be had upon the judgment, until this discontinuance of the Writ of Error be certified from the Court where the Writ of Error is discontinued, unto the Court where the judgment was given.

*Car. B. R.* For before such certificate, the Court where the judgement was given, cannot take notice of the discontinuance of the Writ of Error, and before it be either continued, or the judgment affirmed, here execution cannot be taken out.

A Writ of Error lies in the Kings Bench, to reverse a judgment given in Ireland, in the Kings Bench. 27 H. 7. 33.

A Writ of Error out of the Chancery lies upon a judgment in most Cases given in this Court, in the Exchequer Chamber, before the Judges of the Common Pleas and Barons of the Exchequer, by the Statute. 27 Eliz. 8. 31 Eliz. 1.

The assignment of the General Error upon a Writ of Error brought, is to say, that the Declaration is insufficient, and that judgement was given for the Plaintiff, whereas it ought to have been given to the Defendant, and such like general matters, without alleging any particular colourable matter of Error in the judgment. 2 I. Car. B. R. Yet this is usual, and the Errors insisted upon not shown until

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*after the Record be opened in Court, and further day given to speak to it.*

A Writ of Error doth lie for one that is committed by a Justice of the Peace, for a forcible entry committed by him. *Trin. 22. Car. B. r.* For the commitment is grounded upon a Judgment given by the Justice against the party committed, and he may bring Writ of Error to reverse this Judgment, that he may gain his liberty.

All parties are grieved by an erroneous Judgment, may joyn in a Writ of Error to reverse the judgment; for this stands with justice: but persons that are not damnified by it, cannot joyn with others that are damnified by it, to reverse it. *Mich. 22. Car. B. r.* For the Law will not favour any to sue who have cause, nor are concerned.

The Bail cannot joyn with the Principal in a Writ of Error, to reverse a judgment given against the Principal. *22. Car. B. r.* For the principal must reverse the Judgment alone if it be erroneous, because it was only given against him, and not against the Bail: except a Scire facias be brought against the Bail upon the judgment, and judgment be given against the Bail upon that Scire facias, for then he is grieved by the first judgment.

Errors to a judgment ought to be assigned upon the Record. *22. Car. B. r.* That they may appear to the Court, who are to judge of them.

No person shall be compelled to bring a Record into the Court, to make an Error in another Record. *Mich. 32. Car. B. r.* For the Law doth favour matters of Record, and will affirm them rather than question them, without apparent and Legal cause shown to the contrary.

If a Judgment given in an inferiour Court be entered in this manner, *ideo consideratum est*, and the words *per curiam*, are omitted, as they ought not to be, the judgment is erroneous: but if a judgment given in a superior Court, viz. in any of the Courts at Westminster be entred, and the words *per curiam* are omitted, yet the judgment is erroneous. *Mich. 22. Car.*

*r. For inferior Courts are tied to observe their ancient forms of proceedings, and not to vary from them; but the superior Courts have more liberty to vary in some cases.*

He that hath obtained a judgment, if he find that it is Erroneous, may move the Court to have it reversed for his own dispatch; which the Court will do when they are satisfied what the Error is. *Mich. 22.*

*r. B. r. For till such a judgment is reversed, the Plaintiff cannot bring a new Action for the same Cause for which that judgment was given: for if he should, the Defendant may plead the judgment in Bar of his second Action.*

If the Defendant, after judgment given against him,

do bring a Writ of Error to reverse the judgment, but doth not certifie the Record into this Court by the Return of his Writ, the Court will grant that the Defendant may have execution upon the judgment. *Mich. 22. Car. B. r. For though the Law doth not favour unnecessary delays in the proceedings thereof.*

If a judgment be given in any of the Cinque Ports, the Defendant will bring a Writ of Error to reverse it, he must bring his Writ of Error before the Lord and Constable of Dover, and not in this Court. *Mich. 22. Car. B. r. This is one of the Priviledges that belong unto those that inhabit within any of the Cinque Ports, or members thereof not to be sued out of their precincts.*

If an erroneous judgment be given in any of the Sheriffs Courts of the City of London, the Writ of Error to reverse this judgment, must be brought in the Court of Hustings before the Lord Major. *Hill. 22. Car. B. r. For that is the superiour Court, in respect of the Sberiffs Courts.*

A Writ of Error that is brought in the Parliament is made retornable immediately. *Pasc. 23. Car. B. r. Because that Court during the Session of it, sit continually and hath no vacation, and it is for the honour of that high Court to be immediately attended, that they may do the speedier justice.*

A Writ of Error to reverse a judgment, ought not to be brought before the judgment is signed. *Pasc. 23. Car. For before it is signed it is no judgement, and the Writ of Error runs thus, Si iudicium sit redditum. Yet it is usual to do it in inferiour Courts, to prevent execution, which they will presently take out upon the judgment enired.*

*Q. Whether the Heir may bring a Writ of Error, to reverse an erroneous Judgment given in a personal Action against his ancestor, which Judgment doth charge the Lands of the Heir. Trin. 23. Car. B. r. It seems he may, because he may be prejudiced by the judgment.*

He that brings a Writ of Error to reverse a Judgment in some Actions, ought by the Statute to put in good Sureties to pay the Debt recovered, and the charges of the Judgment, and those that shall be caused by bringing the Writ of Error; in Case the Judgment shall be affirmed and not reversed upon the Writ of Error. *Trin. 23. Car. B. r. For it is reason the party should have recompence for his causeless vexation and delay.*

When

When a Writ of Error is brought to reverse a Judgment, the party that brings the Writ must cause the Roll where the Judgment is entred to be marked, whereby the other party may take notice upon the Record, that the Writ of Error is brought; and this marking of the Roll is a *Supersedeas* in it self, to hinder Execution to be taken out upon the Judgment, but if the Roll be not marked, Execution may be taken out upon the Judgment, notwithstanding the Writ of Error; but if Execution be taken out after it is marked, the party grieved may have a *Supersedeas, quia erronee emanavit*, to make void the Execution. *Mich. 23. Car. B. r. But now the practice is to shew the Writ to the Plaintiffs Atturney under Seal, and that is a Supersedeas after allowance, and Bail put in.*

It is not usual for the Court of Common Pleas, upon a *certiorari*, directed to them upon a Writ of Error brought to reverse a Judgment given in that Court to Certifie the Record into this Court; to Certifie the Original Writ, upon which the Action was commenced there, for that Writ is to remain with the *Custos breviarum* of that Court, to warrant the bringing of the Action, and all the proceedings thereupon. *Mich. 23. Car. B. r.*

A Writ of Error is not to be brought in Parliament to reverse a Judgment given in the Common Pleas, but the Writ of Error ought to be brought in the Court of the Kings Bench. *Hill. 23. Car. B. r. Being the supreme Court next under the Parliament.*

The Chief Justice only, if there be any, and if not, the eldest Judge, and not any other of the Judges of the Court ought to allow a Writ of Error that is



brought. Hill. 23. Car. B.r. Because it is to overthrow judgment, which is a matter of a high nature, and is pronounced by the Chief Justice, or eldest Judge, though with the consent and assistance of the other Judges, and the King directs his Writs to the chief ministers of Justice in that place whither the Writs are directed.

If a Judgment given in this Court be erroneous in matter of Fact only, and not in matter in Law, a Writ of Error may be brought, in this Court where the Judgment was given to reverse it; and it is not necessary to bring a Writ of Error in Parliament; but if the Judgment be erroneous in matter in Law, then a Writ of Error cannot be brought in this Court to reverse it. Pasch. 24. Car. B.r. 1650. B.S. For Error in Fact is not the error of the Judges, and therefore the reversing of a Judgment given by them which is only erroneous in matter of fact, is not the reversing their own Judgment, but it is otherwise if the Judgment were erroneous in matter in Law; and they cannot reverse their own Judgments, because every act of a Court which is final and erroneous, is to be reversed by a higher authority and not the same.

A Writ of Diminution in a Writ of Error, ought not to be granted to be directed to an inferior Court. Trin. 24. Car. B.r. For it shall be intended that the whole Record was at first rectified.

If he that doth bring a Writ of Error, do discontinue his Writ, before the Defendant in the Writ of Error do plead unto it; he may have a new Writ of Error, but if he discontinue his Writ, after the Defendant hath pleaded in *nullo est erratum* to it, he cannot have a new Writ. Mich. 1649. B.S. For then the Defendant hath joyned Issue upon the Writ brought, but before he hath pleaded he may, for the bringing of the new Writ.

Writ, is but the abatement of his own former Writ, and no wayes prejudicial to the Defendant.

If by any possibility there may be supposed to be error in the Record, any person that may be damaged by this error may bring a Writ of Error to reverse it. *Hill. 1649. B.S. For although he be not named a party to the Record, yet the Law hath made him a party to it, by subjecting him to damage by it, and it is therefore reason he should be permitted to use all lawful means to defend himself from it.*

A Judgment may be an erroneous Judgment, although it be not given for the Plaintiff, but the Defendant is thereby acquitted ; for it may be erroneous in the entry of it, for it may be it is entred with a *Cassium* against the Plaintiff, whereas it ought to be in *Misericordia pro falso Clamore*. *Hill. 1649. B.S. Et è contra. Q. Whether in such case the Plaintiff may bring a Writ of Error.*

A Writ of Error is not like another Writ, for a Writ of Error may be abated as to one person concerned in the Judgment, and yet may stand good as to another person concerned, & so cannot another Writ. But if the Writ of Error be brought in a Case where it will not lie at all, it must be abated in the whole. *Hill. 1649. B.S. 27. Jan. For there is no ground for the Writ ; but in the other case the ground remains good.*

All the parties privies to the Record may joyn in a Writ of Error to reverse it, if it be erroneous. *Hill. 1649. B. S. For they are concerned in it, and may be prejudiced by it.*

Q. A Writ of Error may be brought to reverse a Judgment before a Writ of Enquiry of damages, which Issues out upon the Judgment, be executed. *Hill. 1649. 2. Feb. B. S. And this will stay the*

*the Execution thereof, for that Writ is grounded upon the Judgment.*

2. The party who is to have benefit by a Judgment, may bring a Writ of Error to reverse it, as well as the Defendant. *Hill. 1649 B.S. 4. Feb. This seems to be true, where it concerns himself only.*

If a Writ of *habere facias possessionem*, to deliver possession to the Plaintiff, of Lands recovered by him, in an *ejectione firme* doth contain in it more Acres of Land, than were contained in his Declaration, the Writ is erroneous, for there is no warrant for such a Writ : but if the Sheriff do deliver possession of more Acres of Land than are contained in the Writ, this doth not make the Writ erroneous ; for that is the Error of the Sheriff, and not of the Writ : but there an Action upon the Case doth lye against the Sheriff for doing it, or an Assize may be brought against him, that hath the possession delivered to him, for the surplusage of the Land delivered unto him. *18. Nov. 1650. B.S. For for so much he is a Disseisor, because he never recovered it, and so ought not to have possession delivered him thereof.*

A Writ of Error ought to mention before whom the Judgment was given, for the reversing whereof it is brought. *31. Jan. 1650. B. S. That it may be the more certain.*

A Writ of Error which is brought to reverse an Out-lawry, was wont to be signed by the King.

If Judgment be given upon a matter, which doth arise out of the Jurisdiction of the Court where the Judgment is given, this is an erroneous Judgment. *3. Feb. 1650. B.S. For such a Judgment is given coram non Judice, and so is void in toto, and it is as if no judgment were given.*

If a Judgment be entred *quod recuperare debeat*, a Writ of Error cannot be brought to reverse this Judgment, for it is not a perfect Judgment, for the Judgment ought to be *quod recuperet* in the Present Tense. 10. Maii. 1651. B. S. Else it is not a present judgment, but a judgment in expectancy: then a Writ of Error, notwithstanding what is before alledged, will not lie upon a Judgment entred by Default, or confession in an Action of Trespass, or Trespass on the Case, before a Writ of Enquiry executed, and Judgment thereupon; for in such Cases Judgment is, *quod recuperare debeat*.

A Writ of Error doth lie for the Husband to reverse an Out-lawry against his wife. 10. Maii. 1650. B. S. For his own interest is concerned in it, and he is bound to defend and vindicate his wife in all lawful things.

If there be two Writs of Error brought to reverse one Judgment, and one of the Writs is good, and the other is erroneous, the Court will take that which is good without any consideration had of the other, if it be to affirm the Judgment. Trin. 1651. B. S. For the Court doth not favour overthrowing of Judgments, where by Law they may be maintained.

Errors were assigned in a Record in the Vacation upon a Writ of Error brought to reverse a Judgment, and although the Errors were material; yet because they were not assigned in the Term, the Writ of Error was quashed. Hill. 1655. B. S. For the Court cannot take notice of them, nor proceed to the tryal of them upon such an assignment.

Entry.

## Entry.

If one Enter into the house of another without his consent, although the door of the house was open when he Entred into the house, yet this is a forcible Entry. *Mich. 24. Car. B. r.* Because it is against the will of the possessor of the house; but it is intended of such an Entry, as I conceive, whereby he that enters, doth out the possessor of the house from his possession.

Words alone cannot make an actual Entry and Ouster, although they be violent and threatening, but there must be force used by the party to make it so. *Mich. 1650. B. S.* For the word Ouster doth imply a violent act to be done, viz. a violent putting out, and not words spoken only.

If he who hath right of Entry into a Fee-hold in question, do Enter into part of it, this Entry shall be accounted an Entry in all that part of it, which is in the possession of one Tenant, though he Entred not into all that he possessed; but if there be several Tenants possessed of the Free-hold in question, there must be several Entrys made upon the several Tenants, in respect of their several interests; but if he who hath no right to Enter doth Enter, he shall gain title to no more by his Entry, than that part only, whereupon he did make his actual Entry. *8. Nov. 1650. B. S.* So note a difference where he that entered it, hath a claim of Entry, and where not, in respect of the favour the Law affords.

If one do make an Entry into Lands, &c. in the possession of another, and he upon whose possession, the Entry is made, do notwithstanding such Entry



try continue in possession of the Lands, &c. with his servants and cattel, such an Entry is to no effect to gain the possession; because he ~~that~~ was in possession was not Ousted by this Entry, for the possession of his servants and his cattel are his possession: but if upon the Entry his servants and his cattel be Ousted from the Land, he that is thus Entred upon, must prove that after this he did again make an actual Entry into the Lands, or else he shall not be judged to have regained his possession. 25. *Ap.* 1650. *B. S.* For there must be an actual re-entry to gain the possession against an actual Ouster.

A special Entry into a house with which Lands are occupied by claiming the whole is a good Entry, as to the whole house and Lands to reduce the title to him that makes this special Entry from him that was in possession of it, and upon whom he entred. *Trin.* 1651. *B. S.* But a general Entry will not serve the turn, a general Entry is an Entry made without any particular claim made unto any other things, than unto that house, or piece of Land upon which he Entred.

If one do live in the house with his father, and do continue in the house after the death of his father who dyed in possession, his continuing there, shall not be said an Entry to avoid an estate in the house. *Pasc.* 1652. *B. S.* For it shall not be intended that he keeps in possession upon any other colour, than as one of his fathers family, left in the house at his fathers death, except the contrary do appear.

If one will disclaim a Suit, he that doth disclaim, must Enter his disclaimer upon Record. 1652. *B. S.* Or else the Court cannot take notice thereof; for of pri-  
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vate Actions between the Plaintiff, and the Defendant, the Court ex officio are not bound to take notice; and such are all such things as do not appear upon Record.

### Examination.

A witness that is to be at a tryal to testifie his knowledge there, ought not to be examined in any matters concerning the tryal before the tryal, except the Plaintiff and the Defendant do agree thereunto. *Hill. 1649. B. S.* For this would be to prepare him for his testimony against the tryal, which ought not to be, for it is a sort of tampering with the witness, which the Law allows not.

It is usual in the Court of Common Pleas, when a Fem Covert levies a fine, for the Judge to examine her, whether she do it willingly or no, before they take the fine; which they will not take without her free consent. But where a Fem Covert suffers a recovery, she is not examined. But Rolle Chief Justice said, That he doth alwaies examine a Fem Covert that comes before him to suffer a recovery. *8. Nov. 1650. B. S.* For the mischief may be as great by the not examining of her in the one case as in the other, and therefore it seems but reasonable that equal care should be had in both cases to prevent it.

If a Copy of a Will to be made use of at a tryal be to be Examined in the Prerogative Office, it ought to be Examined by the Original Will there, if the Original will be in the Office, and not by the Register Book there where the Will is entred. *23. Apr. 1651. B. S.* For the Will may be misentred there, and altered thereby, that it cannot be said to speak the mind of the Testator.

By Glyn Chief Justice, The *Custos brevium* ought to examine the Issue to be tryed with the Plaintiffs Atturney before the tryal. *Trin. 1655. B. S. That the tryal may not miscarry, by reason of some slip in the making of the Issue; but the usual course is for the Atturney to examine it, and to put his hand thereunto.*

In the Case of one *Frith. Hill. 1658.* The Court was moved that a witness that was to be at a tryal might be examined before a Judge: But Glyn Chief Justice denyed it, for he said, *That this would tend to destroy the Law, to put evidence in papers, and it is against the honour of the Law, and therefore not to be done, but in extraordinary cases; though the parties will consent unto it.*

In the Case of one *Mason. Hill. 1657.* After Issue joyned, and before the Atturney had entred it he dyed. The Court was moved that it might now be entered, which without motion ought not to be done, and it was granted.

*Exemplification.*

One may exemplifie a Deed (that is) make a Copy of it under the great Seal in Chancery, and so he may answer a Bill, and Interogatories in Chancery, and other proceedings there, and such an Exemplification is Authentick, and may be given in evidence to Jury upon a tryal, *23. Maii. 1651. B. S. Without affirm that these proceedings thus exemplified, are Examined by the Originals.*

A Rule made in the Common Pleas may be Exemplified in that Court. By Pinsent Preignatory, and the Court there. *1651. C. B. The like may be done in the Court of Kings Bench.*

*Exigent.*

*Exigent.*

An Exigent against two which is returned in these words, *Non comparuerunt*, and the words *Nec aliquorum comparuit* omitted, is erroneous, and to be reversed. 21. Car. B. r. For if any one of the two do appear upon the Exigent, he that appears ought not to be Out-lawed, and so the return is uncertain; for it cannot be known which of the parties did not appear, nor consequently which of them is Out-lawed.

*Execution.*

By *Glyn.* Chief Justice. *Trin.* 1660. If the Record of a Judgment given in the Common Pleas be removed into this Court, the party cannot take out Execution upon the Judgment without a *Scire facias*; for the party against whom the Judgment was had, may have matter to shew why Execution should not be had.

An Execution may issue forth out of this Court notwithstanding a Writ of Error be brought in the Exchequer Chamber, to reverse the Judgment given here; and upon which the Execution is grounded, if this Court be satisfied that there is no Error in the Judgment; or if the Record be not duly removed out of this Court by the Writ of Error. *Mich.* 22. Car. B. r.

If a Judgment given in another Court, be reversed for Error in the Kings Bench. the party shall have Execution in the Kings Bench. 9. Aff. pl. 8. 21. E. 46.

One may pray for Execution upon a Judgment of Re-

given in the Court where it was given, although a Writ of Error be brought to remove the Record, and to reverse the Judgment, if he that brings the Writ of Error, do not assign his errors in due time. *Mich. 22. Car. B. r. Because in such case, the Court will binder the Writ of Error to be brought only for delay.*

The Court may grant Execution upon a Judgment given, although a Writ of Error be brought, to reverse the Judgment if the Court be satisfied, upon examination of the Record, that the Writ of Error is brought merely to delay the party from his Execution. *Mich. 22. Car. B. r. For the Law doth not countenance delays, but delights to have speedy justice done to all parties, though it loves not to surprise any person by o-  
basty proceedings.*

If Execution be not taken within one year and a day after Judgment is given in a Cause, there must be a Scire facias taken out to revive the Judgment, and Execution cannot be taken out before such a Scire facias is taken forth, and Judgment thereupon obtained. *Mich. 22. Car. B. r. But this Scire facias may within a time be taken out of course without moving the Court; if Execution be not taken out in ten years after or thereupon, then a Scire facias cannot be taken out to revive a Judgment without moving the Court, or at the side bar; but upon motion the Court will grant it.*

The Court will not deliver one out of prison that is there in Execution upon an Affidavit. But the party may have a Writ of Supersedeas to supersede Execution, if there be cause. *Trin. 24. Car. B. r. The matter contained in the Affidavit never so long for the prisoner, because he lies in prison by matter of Record, and must be delivered by an Act of as*

high a nature which an Affidavit, although it be made in Court, or before a Judge of the Court, and is filed in Court, is not.

The Court cannot divide an Execution which is entire. Mich. 24. Car. B. r. For this would be to divide the Judgment upon which it is grounded; for the Execution is grounded on the Judgment.

If the Record be not certified in due time after the Writ of Error is brought to reverse a Judgment, he that hath the Judgment, may take out Execution of Course without moving the Court to have leave to do it. Mich. 1649. B. S. For it shall be intended that the Writ of Error is meerly brought for delay, because the party doth not prosecute it, and it shall be all one, as if it had not been brought; for to prosecute faintly and not to effect, is counted in Law no prosecution.

After a Judgment is signed, there may be Execution taken immediately upon it; and it is not necessary that the Plaintiff should forbear to take out his Execution, until the Judgment be entered. Mich. 1649. For it is a perfect Judgment of the Court before it is entered, for the entry of it, is the Act of the Clerk, and not of the Court; and it may be he may be dilatory in entering of it, to the prejudice of the Plaintiff.

If the Plaintiff in a Writ of Error to reverse a judgment be non-suit; yet the Defendant in the Writ ought not to take out Execution without a *Scire facias* first sued out against the Plaintiff in the Writ of Error. 15. Nov. 1650. B. S. *Q. tamen.* For it seems the Plaintiff shall not bring another Writ of Error to reverse that Judgment, but that such non-suit shall be peremptory unto him.



If a Writ of Error be brought in the Exchequer Chamber, to reverse a Judgment given in this Court, and the Judgment is affirmed there; yet that Court cannot make out Execution upon the Judgment affirmed, but it must be done in this Court where the Judgment was given. 18. Nov. 1650. B. S.

If Judgment be affirmed upon a Writ of Error in the Exchequer Chamber, no Execution shall go against the Bail in the Original Action for the Costs taxed occasione dilationis Executionis. Per Magistrum Livesay, & alios &c. Pasc. 21. Car. 2di. Regis.

If an Execution be returned, as executed, and filed, the party can never have another Execution upon that Judgment, upon which the Execution was grounded; for there can be but one Execution executed upon one Judgment: but if it be not returned and filed, he may have another Execution. 10. Feb. 1650. B. S. *For the returning and filing it, makes it to be an Execution Executed; but before it was returned and filed, it was but an Execution executory or in fieri, and there cannot be intended to have been any satisfaction made to the Plaintiff by vertuet hereof.*

If one have a Judgment given for him, and he doth afterwards bring an Action of Debt upon this Judgment, but doth not give any Declaration unto the Defendant; the Plaintiff may at any time within the space of one year next after the Judgment given for him, take out Execution upon his Judgment. 1652. B. S. *For the bringing of an Action of Debt, doth not take away his Judgment, and his not prosecuting of his Action of Debt, doth presume he will*



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waite that *Action*, and resort to his Execution upon the Judgment ; but if he give a Declaration, it is otherwise, for then he shews that he intends to proceed upon his *Action of Debt*, and both waies he may not proceed.

### *Elegit.*

Upon a *testatum*, an *Elegit* doth lye into the principality of *Wales*, or into the County Palatine of *Cheshire*. *Hill. 22. Car. B. r.*

### *Essoigne.*

The *Essoigne Roll* in the Court of the Common Pleas, is a Record of the Court, and doth remain in the Custody of the Clerk of the *Essoigns*. *Pasc. 23. Car. B. r.* The *Essoigne Roll* is a Roll wherein is entred that the party was *Essoigned* to another day, for some excuse that he could not then appear.

If a Declaration be delivered to the Defendant after the *Essoigne* day, the Defendant is not bound to plead that Term ; but may *Emparle* unto the next Term: *3. July. 1650. B. S.* For it is accounted for a Declaration of that Term, and not of the precedent Term.

### *Exception.*

The Council at the Bar ought to take all their *Exceptions* to the Record at one time, or at least before the Court have delivered any opinion in the cause. *Pasc. 23. Car. B. r.* For the Court is not bound to hear any afterwards ; for this would hinder dispatch of *Business*.

A Negative expreffion may be taken to inure to the fame intent, as an Exception doth. *Trin. 23. Car. B. r.* For an Exception is but in its nature a denial of a matter taken to be good by the other party, either in point of Law or pleading.

*Exceptio in non exceptis firmat regulam.*

### *Estate.*

No Estate can be limited to commence after a Fee simple, because a Fee simple is the largest Estate that can be imagined in the eye of the Law, and shall not be supposed to have a possibility, to have an end or determination. *Trin. 23. Car. B. r.*

Such an Estate which is not settled at the time of the making of it, but doth depend as to the being of it upon another estate which is not certain, but may either take effect or not take effect, is a contingent Estate. *Trin. 23. Car. B. r.* Because it depends upon an uncertainty; and may be or not be, according to the several event of things, touching that other estate upon which it depended.

### *Enrollment.*

An Enrollment of a Deed, is either an Enrollment of it by the Common Law, or an Enrollment of it according to the Statute of Enrollments. *Trin. 23. Car. B. r. Vide the Statute.*

If a Deed be Enrolled by the Statute, and the Enrollment of that Deed is to be pleaded, it must be pleaded precisely, that it was Enrolled according to the Statute. *Trin. 23. Car. B. r.* That the Plea may

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be certain, and that it may appear whether the Statute was pursued as it ought to be.

The Enrolling of a Deed doth not make the Deed to be a Record, but by the Enrollment it doth only become a Deed Recorded. *Mich. 23. Car. B. r.* For there is difference between matter of Record, and a thing Recorded to be kept in memory ; for a record is the entry in Parchment of Judicial matters controverted in a Court of a Record, and whereof the Court takes notice, but an enrolment of a Deed, is but a private act of the parties concerned, of which the Court takes noe cognisance at the time of the doing it, although the Court give way to it.

If an Issue be, whether Enrollment or not Enrollment, this issue is tryable by a Jury, and not by the Enrollment : because this issue concerns matter of Fact, which is tryable by a Jury, though the Enrollment be done by an Officer of the Court. *Mich. 23 Car. B. r.*

Before the 20. year of Q. Eliz. it was not used to Endorse the Enrollments of Deeds upon the back of them, as it is now used to be done. *Mich. 23. Car. B. r.* But now it is constantly used ; and to good purpose, in respect of the more easier and readier proof of the Enrolment upon any occasion ; for credit is given to that endorsement, without any further proof, as being made by a known Officer, and entrusted for that purpose.

An Enrollment of a Deed ought to be made in Parchment, and Recorded in Court. *Pasc. 24. Car. B. r.* For perpetuities sake.

If the Inrollment of a Deed be lost, yet the Enrollment is good evidence if it can be proved to a Jury by circumstances, that there was an Enrollment. *Pasc. 24. Car. B. r.* For the loss of a Record or Deed, is not the loss of a mans title, if it may otherwise be proved.

The

The Enrollment of a Deed is a sufficient proof of the Deed it self upon a tryal. Mich. 1650. B. S. For every Deed before it is Enrolled, is to be acknowledged to be the Deed of the party before a Master of the Chancery, if Enrolled in Chancery; or before a Judge of the Court where it is Enrolled.

If Lands be conveyed in a Deed for money only, then that Deed must be Enrolled, else the Lands will not pass by the Deed, but if Lands be conveyed in a Deed, in consideration of money paid, and also in consideration of natural love and affection, there it is not necessary to Enrol the Deed, but the Lands will pass, though the Deed be not Enrolled. 5. Feb. 1649. Hill. B. S. For in the former case it is a meer Deed of Bargain and Sale, which passeth nothing without Enrollment; but in the latter case the Land may pass by way of use.

*Escape.*

If the Sheriff suffer one taken by him in Execution to Escape, the party, at whose Suite he was taken in Execution, may either have an *Alias Capias* against the party that Escaped, to take him again in Execution, or an Action upon the Case against the Sheriff that suffered him to Escape. Mich. 23. Car. B. r. But if he be imprisoned upon the Execution, and after Escape, there lies not an *Alias Capias*, but only an Action against the Gaoler.

An Escape in one place, is an Escape all England over. 6. Nov. 1650. B. S. For if the prisoner be once at large, it shall be intended he may go whither he please.

An Administrator may bring an Action of Escape,

for an Escape suffered of a prisoner of the Intestate in his life time. *Trin. 23. Car. B. r. To recover what the Intestate was damnified in his estate, by reason of the escape.*

An Escape in one place is an Escape in all places ; for if a prisoner be once Escaped and at large, it shall be intended he is confined to no place, but may go at large where he pleaseth ; so that for an Escape, the party whose prisoner is Escaped, may bring an Action for this Escape in what County he pleaseth, for the Action is not Local or fixt to any certain place. *Trin. 24. Car. B. r. But transitory, and may be laid in any place.*

#### *Extent.*

Lands in the hands of a Trustee may be extended for a Debt due to the King. *Hill. 23. Car. B. r. Q. Whether they are extendable for any other Debt, due to a common person.*

#### *Escheator.*

The King may by his special Commission, make one or more Deputies Escheators, to find an Office, and this hath been used to be done after the death of a Noble man or other person of great quality. *Pasc. 24. Car. B. r. For the Escheators were not Officers for life, but put in every year by the Lord Treasurer of England.*

*Fine.*

**T**He Court may set a Fine upon one that shall beat any of the Court, or the Jury impannelled to try a Cause there, or the Procurers. 27. *Aff.* 63. 44: 32. *H. 6. f.* 40.

A Fine for a licence of Alienation to alien Lands held in *Capite*, is to be paid in Chancery, for there is the pardon for Alienation of such Lands without licence to be sued forth. 21. *Car. B. r.* And thence the Writ granted, upon which the party hath leave to alien such Lands.

If an Officer of this Court do not give his due attendance upon the Court, as his place requires, the Court may set a Fine upon him for his neglect. *Trin.* 22. *Car. B. r.* For the Court hath the Governance of such Officers, and is to punish misdemeanours.

This Court may set a Fine upon the Clerk of the peace, who returns an Endicement into this Court, upon a *Certiorari* directed to remove the Endicement into this Court, if the Endicement be not good in the matter of form. *Trin.* 22. *Car. B. r.* For it shall be intended that it was his negligence, that the Endicement was not well drawn, for it shall not be presumed that he can be ignorant in the form of drawing Endicements, and he is an Officer accountable to this Court for things done in relation to his office.

The Court cannot set a Fine upon a Sheriff that is out of his Office. *Mich.* 22. *Car. B. r.* For then he ceases to be an Officer of the Court, and consequently the Court cannot punish him as an Officer of the Court.

If the Conusee of a Fine levied of Lands, do pay money unto the Conusor of the Fine at the time of the Fine levied,



levyed, and there is no use declared to lead the use of the Fine levied of these Lands; the Law will construe the Fine to be levied of these Lands to the use of the Conusee, to whom the Fine is levied ; but if there be no money paid by the Conusee, nor any use declared, the Fine shall enure to use of the Conusor that levied the Fine. *Pasc. 23. Car. B. r.* For nothing appears, whereby it can be supposed that the parties had any intention, the Estate in the Lands should be altered by the Fine, but that the Fine was levied in Corroberation only of the title of the Conusor ; but where money is paid, the Law will intend that he that paid it is to have benefit by the fine.

If Justices of peace do proceed upon an Indictment, after a *Certiorari* out of this Court is delivered unto them, to remove the Indictment into this Court ; This Court may set a fine upon them for their contempt to this Court, in not obeying the Process thereof. *Hill. 23. Car. B. r.* This was done heretofore in the case of Sir John Sedley, and Sir Thomas Scile, two Justices of the peace of the County of Kent.

If a *Habeas Corpus* do issue out of this Court, and the party to whom it is directed do make an insufficient return of it, this Court may set a Fine upon the party for making this insufficient return. *Pasc. 24. Car. B. r.* For it shall be accounted his negligence, or falsitie, that he makes not a good return.

A Fine and recovery cannot destroy an estate executory, which depends upon contingencies ; but it will destroy a Remainder. Because it is uncertain whether there shall ever be such an estate in esse for the Fine to work upon : but it seems it is not so of an Estate in Remainder. *2. Pasc. 24. Car. B. r.*

If part of a Fine that is set upon one that is convicted upon an Endictment, or information for an offence done by him contrary to a Statute, do belong to a subject, as it may if the Statute do so direct all the fine set upon the party, ought not to be estreated into the Exchequer. *Pasc. 24. Car.B.r. But the Kings part only ought to be estreated; for if it should, this would put the Informer to trouble to get his part.*

A Fine *sur Cognissance de droyt, come ceo, que il ad, de* &c levied of Land, doth admit the possession of the Lands, of which the Fine is levied to pass by the Fine; for no man shall be presumed to give an estate which he hath not: but a Fine *come droyt*, levied of Lands, doth only pass the right of the Conusor in the Lands of which the Fine is levied. *Mich. 1649. B. S. For one may have right, though he hath not the possession.*

A Fine *sur Cognissance de droyt come ceo, &c* is a Reoffment upon Record of the Lands comprised in the Fine, and doth imply a Livery and Seisin to be made of those Lands. *Hill. 1649. 26. Jan. B. S. To pass the Estate out of the Conusor to the Conessee.*

A Fine of twenty nobles, was set upon one, for bringing an Attaint against a Jury, after the Jury had been formerly acquitted. *Hill. 1649. 4. Feb. B.S. For alleviation of the party.*

A Fine set upon one which is voidable, that is, may be avoided, is not void absolutely, but continues to be a good Fine, until it be avoided by the Plea of the party that is Fined. *Pasc. 1650. 4. Feb. B.S. Otherwise is a Fine that is void.*

One may declare the use of a Fine by Paroll; and

and if there be such a Declaration by Parol, made to lead the use of a Fine, and it be defective, to declare the intent of the parties, it may be afterwards supplied and made good by subsequent Parolls. & Nov. 1650. B.S. *For the words are but to shew the intent of the party how he meant the Fine should work, and is in affirmance of the Fine.*

*Filing of Process or other thing.*

A *Capias* that is duly sued forth, may be filed afterwards, and it is not necessary to file it at the time when it is taken forth. 21. Car. B. r. *For the Filing of it doth contribute nothing to the essence of the Writ ; yet it seems fairer practice to file it presently.*

A Declaration may be Filed in the Office after a Writ of Error is brought, and so is it of a Warrant of Attorney. Pasc. 24. Car. B. r. *For the Defendant is at no prejudice by the filing of them, and he did take notice of them, as appears by his pleading and going to issue with the Plaintiff ; and the filing is not of the essence of the Declaration.*

Affidavits which are not read in Court, may not be filed there, until the Secondary hath made his report in the cause, touching which such Affidavits were made, but if they be read in Court, they may be presently filed. Trin. 24. Car. B. r. *For the Court take no notice of them, until they be read in Court, or that they are taken notice of by the Secondary, upon examination of the matter referred.*

An Original Writ may be Filed after Judgment given in the cause, for which it is sued forth ; if it were sued forth before the Judgment given. Trin. 1650. 26. Junii. B.S. *Else not.*

It is now used, that if a Rule be made upon the reading of Affidavits in Court, the Clyent ought not to have the Affidavits out of Court, but they ought to be filed, that Copies may be taken of them, if either party desire it.

The Court will not compel the Plaintiff to file a *venire facias* after a Verdict, if the *Venire* will make an Error, for if there be no *venire*, that defect is helped by the Statute of *Jeofailes*, but if there be a *venire*, and that *venire* is erroneous; this is not helped by the Statute. *Trin. 1651. B. S.* And therefore the party shall not be compelled to do a thing indifferent to be done or not to be done to his own prejudice.

*Fa'se Latin and Form.*

The Court doth use to amend false Latin and Form in Bills presented unto them by the grand Enquestis every Term by their licence and consent; but the Court cannot amend matter of substance in them. *Mich. 22. Car. B. R.* For that were to make new Bills; but the altring of them in the form only, alters not the substance of them.

*Forma Pauperis.*

By *Will* at the Bar, It was said that none ought to be admitted to sue in *forma pauperis* in an Action of the Case for words. Q. whether he meant to sue, or to defend, or in neither case.

If one that is admitted to sue in *forma pauperis* will not proceed according to the Rules of the Court, but useth delays to vex his adversary, the Court will Dispau-

Dispauper him. Mich. 22. Car. B. r. For the Law doth not favour the poor to do injury to others, but to help them to recover their right, where they want ability of themselves to do it.

If one that doth sue in *forma pauperis*, be non-suited at the tryal, he must not pay costs to the Defendant, but be whipped, or suffer such punishment as the Court shall award. Pasch. 1652. B.S. For the Law will Judge he had no cause of Action, and therefore he must make satisfaction to the Defendant for unjustly vexing of him in his person.

If it be proved unto the Court, that one who sues in *forma pauperis* is a vexatious person, and hath many frivolous Suites depending, the Court will Dispauper him. 1654. B.S. For this will be a means to make him less contentious, and the Law doth not favour unnecessary and vexatious Suites.

Rolle Chief Justice said, That he did not use to admit any one generally to sue in *forma pauperis*, that is to sue in all Causes; but only to sue so in one Cause by vertue of that admittance. 1654. B. S. So that if he had other Cause to shew, he must petition again to be admitted to sue in *forma pauperis*, & sic toties quoties,

#### Forfeiture.

If one take a Wife, that is Seised of Gavel kind Lands, and she dyeth without issue by her husband, her husband shall be Tenant by the curtesie of half of the Lands so long as he shall live unmarried, but if he marry again he shall Forfeit his Estate in the Lands. Mich. 22. Car. B. r. This is by the custom of Kent, but by the same custom, if he had issue by his wife,

then he shall be Tenant by the curtesie of all the Lands his wife was seised of, and although he do marry again, he shall not Forfeite his estate. Mich. 22. Car. Q. Whether in the former Case, he shall forfeit his Tenancy by the curtesie, if he do live incontinently, as the wife shall her Dower by a like custome.

If a Lease be so made, that it is to be Forfeited, if the Rent reserved in the Lease be not paid, as the Lease doth provide; although the Rent be not paid accordingly, yet there is no Forfeiture to be taken, if there was not an actual and Legal demand of the Rent made by the Lessor. Mich. 23. Car. Br. For the Law doth not favour defeating of estates; and it cannot else so well appear, that there was an actual failure of payments.

If a Copy-holder do deny to pay unto the Lord the fine which is ascertained due unto him by the Copy-holder, or do refuse to appear at his Lords Court, and to do his Suite there; this is a Forfeiture of his Copy-hold estate. Trin. 24. Car. Br. For he holds his Copy-hold of the Lord upon these conditions implied in Law.

If a Copy-holder do let his Copy-hold unto another for years, and the Lessee do sell the Timber growing upon the Copy-hold, yet this is not a Forfeiture of the Copy-hold estate. 6. Nov. 1650. B. S. Because the Copy-holder himself did not do it, and he had power to let his Copy-hold for years, and so did no wrong.

*Franchise.*

No Franchise shall be allowed in any case where the Franchise doth fail to administer justice within the Franchise;



Franchise ; but if there be such a failer, this Court by their Authority may intermeddle ( notwithstanding the priviledges of the Franchise ) to compel them to do Justice. *Mich. 22. Car. B. r.* For priviledges are not granted to protect men in neglecting to do right, or to do wrong : and this Court is the superintendent Court of the Nation, to see Justice equally distributed to all persons.

### *Fees.*

In such Cases where the Sheriff is to have Fees, there he is not bound to execute his Office in returning of Writs, &c. until the Fees that are due unto him be tendred unto him. *22. Car. B. r.* For otherwise he must be put to trouble and charge to recover them, which the Law will prevent, in favouring him as being a publick Minister employed in the Execution of Justice.

The Statute of 23. H. 5. which doth give Fees to Sheriffs, doth only extend to their executing of Writs of Execution. *22. Car. B. r.* And not other Processes.

In the Case of *Hene and Nisbit. Pasc. 1659.* By Glyn Chief Justice, There are no Fees due to the Sheriff for executing an *Habere facias possessionem*, and so let it be declared, although they have usually taken 2. s. 6. d. for executing such Writ.

There are no Fees due to the Sheriff by the Common Law by the subject for executing his Office ; but the King ought to pay him his Salary. *Mich. 22. Car. B. r.* For as the people do owe Allegiance to their King, so the King doth owe Administration of Justice, and protection unto his people, and is bound to do it at his own charge.

An Action of Debt doth lie for a Councillor or an Attorney for his Fees, against him that retained him in this cause. *Mich. 22. Car. B. r. Q. Whether it lye for a Councillor without a special retainer.*

If a Clyent, when his business in Court is dispatched, doth refuse to pay unto the Officer in Court, the Fees which are due to him for doing his business; the Court will upon motion grant an Attachment to the Officer against the Clyent, to have him committed, untill he pay the Fees due. By *Rolle Chief Justice. 1650. For the not paying the Fees, is a contempt to the Court, and the Court is bound to protect their Officers in their rights.*

*Felony.*

Where one is doing of an unlawful act, and the death of any person ensueth upon the doing of that act, though the death of the party was not intended by him that did the Act, yet this is felony. *P. sc. 23. Car. B. r. For the Law will judge, that he that would do one unlawful Act, might have an intention to do any other unlawful act, which might be occasioned upon the doing thereof.*

If one be committed to the Gaol for one Felony, the Justices of the Gaol delivery, may enquire and try him for another Felony for which he was not committed, by vertue of their Commission. By *Bacon Justice. Trin. 23. Car. B. r.*

It is Felony to personate a Bail. By the Statute of *Jacob. Mich. 22. Car. B. r. Q. Whether the procuring of one to personate a Baile be Felony.*

The receiving only of stolen goods, is not Felony;  
Q but

but the receiving of them, and comforting the Felon is Felony. *Pasc. 24. Car. B. r.* For he may receive them, and not know them to be stolen, but the comforting the Felon, doth prove that he consented to the Felony, and approved of the act, and a countenance of it.

If one be set upon in the High-way or other place to be robbed, and he do cast away his goods with an intent to save them from the robber; and the robber doth take them up, and carry them away, this is a robbery and Felony committed to the person of the party robbed, although he took nothing from his person. *Mich. 1649. B.S.* For the party is robbed of his goods, and the thief knew them to be the parties goods, and came with an intent to take them from him, had he not cast them away, and was the cause that he cast them away.

One ought not to be arrested upon suspicion of Felony, except that there be good cause shewed for the ground of this suspicion. *1649. B. S.* For every foolish fancy or conceit, is no ground of a suspicion sufficient to arrest one for so good a crime; but there must be probable causa for the suspicion.

It is Felony to take a Bill from off the File, after a Verdict in the cause for which the Bill was sued forth. *Mich. 1649. B.S.* For this is embezzeling of Record.

The robbery of a servant of his masters money in his custody, if it be in presence of his master, robbing of the master. *Mich. 1649. B.r.* For it is all one as if the money were in the custody; for the servant hath not the property in it in respect of his master.

A robbery shall be said to be done in that Hundred where the party robbed is first set upon, although his goods be taken from him in another Hundred. *Mich. 1649. B. S. For there the robbery was begun, and the first broken, and the taking of the goods, is but a continuation of the first action.*

A Hundred shall not be charged for a robbery committed within it upon the Statute of *Winchester* in *Crepusculo* or twilight, that is, when it is neither perfect day nor perfect night; but if it be committed by day light, although it be before the rising of the Sun, or after the setting of it, the Hundred shall be charged. *31. Oct. 1650. B. S. For in the twilight the Felons cannot be well discovered.*

A Hundred shall not be charged for a robbery committed within it in the night, because hue and cry cannot be made in the night, for that is a time for rest. *1650. B. S.*

If a robbery be begun in the day light, but is not ended till dark night, yet the Hundred where it was done is chargeable for it by the Statute of *Winchester*. *1650. B. S. For it is accounted one continued act, and shall relate to the beginning of it.*

***Fee simple.***

A Feoffment made of Lands to one and his Heirs Males is a Fee simple. *Mich. 23. Car. B. S. For it is an estate comprised within the Statute of West. 2. De donis conditionalibus, and before that Statute, there was no estates in tail, but such estates were accounted limited or ceremonial Fee simple.*

## False Imprisonment.

An Action of False Imprisonment, doth lie against a Bailly, by the party that is Arrested by him, after the return of the Writ is past. *Hill. 23. Car. B. r.* For this is all one, as if he were Arrested without a Writ, for by the return of the Writ, the Sheriffs and Bailiffs power are at an end, as to that Writ, and so they have no power by vertue thereof to Arrest the party.

If a Process be unduly obtained, and the party against whom it is had, be thereupon taken and imprisoned, an Action of False Imprisonment doth lye by the party Imprisoned against him, at whose Suite, he is Imprisoned. *Mich. 24. Car. B. r.* Because there was no lawfull Authority to Imprison him.

## Feoffment.

A Feoffment made of Lands unto a Fein Covert is a good Feoffment in Law, until the husband do disagree to it; but if he disagree, it is not good, for the wife can neither give nor take without her Husbands consent. *Hill. 23. Car. B. r.* Q. If the husband do not know of the Feoffment made, and after the Feoffment doth die what the Feoffment shall operate.

## Foundation.

None hath power to found a free Chappel but the King. *Hill. 23. Car. B. r.* For it is as much as to create a new Tenure.

The Foundation of a thing may alter the Law, touching that particular thing. *Hill. 23. Car. B. r.* But not to a general prejudice.

*Fiction of Law.*

The Law ought not to be satisfied with Fictions, where it may be really satisfied. *Pasc. 24. Car. B. r.* Yet in some Cases Fictions of Law are necessary, and to be allowed.

*Gavel-kinde.*

**I**F one take to Wife a Woman seised of Gavel-kind Lands, and the Wife dye without having had any issue of her body by her husband ; yet the husband shall be Tenant by the courtesie of half of the Lands, during the time he continues unmarried. But if he marry he shall forfeit his Tenancy by the courtesie. But if he had issue by the wife, if the Wife dye he shall be Tenant by the Courtesie of the whole Land, and although he do marry, he shall not forfeit his Tenancy by the courtesie. *Mich. 22. Car. B. r.* This is by the custom of Kent. *Vid. tit. Forfeiture. 222. 223.*

*Guardian.*

A Guardian of an Infant may acknowledge satisfaction upon Record for a Debt, which he hath recovered at Law for the Infant. *Trin. 23. Car. B. r.* But it must be a Guardian, that is assigned by the Court to sue for the Infant. The act of such a Guardian is adjudged the act of the Infant.

The Court will assign a Guardian to an Infant to sue



ſue for him, if the Infant do come into the Court, and deſire it of the Court, and name the party he deſires to have for his Guardian, and produce him in Court. *Trin. 24. Car. B. r. And the Court will aſſign in ſome Caſes a Guardian for to defend a ſuit for an Infant at the prayer of the Plaintiffe.*

### *Good Behaviour.*

If one do affront any Court of Juſtice, this is a good cauſe to bind the party to his Good Behaviour. *Pasc. 24. Car. B. r. For the affronting of juſtice, is a publick miſdemeanour, and not a private, although it be done, but to the perſon of one man, as to the Judge of a Court, a Juſtice of peace, &c. Becauſe ſuch perſons are publick Miniſters of Juſtice, and act for the Commonwealth.*

He that doth upon Articles ſworn in Court, deſire the party againſt whom the Articles are ſworn, may be bound thereupon to the Good Behaviour, muſt expreſs ſome ſpecial matter in thoſe Articles, for which he ought to be bound to the good behaviour. For if the Articles be only general, the good behaviour is not to be granted upon them. *Mich. 22 Car. Br. For a general accuſation is no accuſation for the uncertainty of it, and the party cannot tell what answer to make to ſuch a general accuſation.*

Perjury is not an offence, for which the party perjured may be bound to the Good behaviour, becauſe it is not a general miſbehaviour. *Mich. 22. Car. B. r. But the party may be Endicted for it, and fined, if he be thereupon convicted.*

One was bound to his Good behaviour, for affrighting people in the night in their houſes, by ſhooting

shooting off of Muskets, and for the assaulting of one going in the high way. *Mich. 22. Car. B. r. For this was accompted more than a particular breach of the peace.*

A woman that is a common scold may be bound unto the Good behaviour. *Mich. 22. Car. B. r. For she is a common disturber of the publick peace.*

The Good behaviour was granted against one upon an Article sworn against him, that he had maliciously pulled down a piece of anothers house. *Hill. 22. Car. B. r. For this is a riotous act, and a high breach of the peace, which concerned the publick.*

A Justice of peace ought not to bind any person to the Good behaviour, upon a general accusation made against the party. *Pasc. 23. Car. B. r. Vid. supra.*

One was bound to his Good behaviour, for stopping of a Constable from making a pursuit after a felon. *Trin. 23. Car. B. r. For this is a publick offence against the Common-wealth.*

The Good behaviour is not to be granted against one, for speaking of words only against one person: but it may be granted against one, for speaking of words against divers persons at several times. *Hill. 23. Car. B. r. For that is a general misbehaviour, but the other is but a particular misbehaviour.*

The Good behaviour was granted against one, upon an Article sworn and read against him, that he said that he would burn down another mans house. *Hill. 1649. B. S. For a man shall be judged in many cases by his words, though no Actions accompany.*

## Heire.

**T**He word Heir is *nomen collectivum*, and extends unto all Heirs. *Trin 23. Car. B. r.*

The Heir is favoured at the Common Law, for at the Common Law the Ancestor could not convey away his Lands, from his Heir at Law, upon his death bed, without the consent of the Heir. *But now by the Statute of 32. H. 8. the Law is altered in that point. Hill. 23 Car. B. r. The Law is the preserver of Inheritances.*

## Heriott.

A Heriott is the fruit of a Rent-service. *Hill. 21. Car. B. r. This is to be meant of Heriot service, and not of Heriot Custom.*

## Habeas Corpus.

No Habeas Corpus shall be made out in the vacation time, to remove a cause out of an inferior Court other than the Court in London, Middlesex, or the Marshalsey, or other Courts within 5. miles of London retognable immediate; but at a day certain in Court: and that every such Habeas Corpus retognable in Trin. or Hill. Term, be not retognable after the second retogn of the Term. *Per Magistrum Livesay, & alios Pasc. 21. Car. 2d. Regis.*

If a Prisoner appear in Court, upon a return of *Habeas Corpus* to remove him hither; and there do

appear

appear by the return, that there was good cause to commit the prisoner to prison, and to detain him there, the Court will remand or send him back to the place where he was first committed; but if upon the return, it doth appear that there was no lawful cause to commit him. then the Court will discharge the prisoner: but if it be doubtful to the Court, whether he was lawfully committed or not, then the Court will bail the prisoner, until the matter do appear whether there was cause or not. *Hill. 21. Car. B. r. Trin. 23. Car. B. r.*

If a Cause be removed in the vacation out of London, Middlesex, or the Marshalsey, or other Courts within five miles of London by Habeas Corpus returnable immediate, and Bail put in as of the first return of the next Term, if the Declaration be delivered eight dayes before the end of the Term, then the Defendant is to plead to answer: and in Mich. Term, if it be delivered before the return day of Crastin. Anim. And in Easter Term, before Mens. Pasc. then the Defendant is to plead to tryal the same Term. Per Magistrum Livesey, & alios. Pasc. 21. Car. 2di. Regis.

A *Habeas Corpus ad respondendum*, is when any one is imprisoned, at the suit of another upon a legal process, in the Fleet or any other prison, except the Kings Bench prison, and a third person would sue that prisoner in this Court, and cannot, because he is not in custody of the Marechal of this Court, there he may have a *Habeas Corpus*, to remove the prisoner out of the prison where he is, into this Court, to answer

swer unto his Action here. 2 I. Car. B. r. *And for that cause it is called Habeas corpus ad respondendum; because he it to answer the parties Action.*

A *Habeas Corpus cum Causa*, doth remove the body of the party for whom it is granted, and all the Causes which are then depending against him. 21. Car. B. r. *And for that reason it is called a Habeas Corpus cum Causa, the body with the cause, which is nomen collectivum, and implies all causes.*

A *Habeas Corpus* is either *ad subjiciendum*, granted on the Crown side: Or, *ad respondendum*, granted on the Plea side. *Ad subjiciendum*, to submit to the Order of the Court in Criminal matters *ad respondendum*, as above said.

The Court will not grant a *Habeas Corpus*, returnable *immediate*; but in some Cases they will give but a short time to return it. Trin. 23. Car. B. r. *For though the Law doth favour liberty, yet it allows convenient time for doing of things.*

But it is in the discretion of the Court to do it, and in the Case of one Sadler. Mich. 21. Car. 2. Reg. The Court granted a *Pluries Habeas Corpus* with a penalty of 100. l. returnable *immediate*.

After the return of a *Habeas Corpus* is read and filed in Court, it cannot be amended. Trin. 23. Car. B. r. *For it is then a Record of the Court.*

None ought to take out a *Habeas Corpus* for a Prisoner without his consent. Trin. 23. Car. B. r. *This holds not in all Cases, for one may take out a Habeas Corpus without his consent, to charge him with an Action.*

A *Habeas Corpus* to remove one that was committed for debt, from one prison to another, may be granted, returnable *immediate*, or rather in *dilate*

for this is only a *Habeas Corpus ad recipiendum*, in the nature of it.

A *Habeas Corpus* was granted out of this Court, directed to the Serjeant at Arms of the House of Commons in Parliament, for a prisoner committed unto him by a Committee of the House of Commons. *Mch. 23. Car. B. r.*

A *Habeas Corpus* was denied for a prisoner to have him for a Witness at *Worcester* Assizes by the Court. *Trin. 1657.*

A Judge of this Court will not grant a *Habeas Corpus* in the Vacation, for a prisoner to follow his suit; but the Court may grant a special *Habeas Corpus* for a prisoner to be at his tryal in the vacation time. *Pasc. 1650. 24. Maii. B.S. For this may concern him more than the other can.*

The Court will grant a *Habeas Corpus* to one, to have a prisoner out of prison to be a witness for him at a tryal, but at the charge of him that desires the *Habeas Corpus*, and at his peril, to take care that the prisoner do not make an escape. *29. Junii. 1640. Trin. B.S.*

By *Newdigate* Justice. *Trin. 1659.* If a *Habeas Corpus* be granted, to give liberty to a prisoner that lyes in prison upon an Execution longer than for one day, this is not according to law.

The Court useth not to put the reason into a *Habeas Corpus*, why they send for the prisoner; for it may be for Treason, or great Conspiracy. By *Justice*.

*Habere*



*Habere facias possessionem:*

One may have a new Writ of *Habere facias possessionem*, if a former Writ of *Habere facias possessionem* in the same Cause be not well executed or returned. *Mich. 22. Car. Br.* For that is all one as if such Writ had never been taken out ; because the party hath no fruit or benefit by it.

*Homage.*

When livery is granted to the Heir at full age, of the Lands for which he was in ward to the King during his nonage, and which were by reason thereof in the Kings hand: his homage which he should do to the King (by reason of his tenure) at the time when the livery is sued forth, is respited for a certain sum of money, to be paid yearly to the King by the heir until the heir shall do his homage, and these monies are called respite of Homage : because by reason of such monies the Homage is respited, or put off from year to year. 1655. B.S. *This leawing is now out of doors by the taking of tenures in Capite away.*

*Hundred.*

227.

If a robbery be begun in the Hundred of *Dale* and ended in the Hundred of *Sal* ; the Hundred of *Dale* is chargeable for this robbery, upon the Statute *Winchester. 1655. B. S. Q.* For it seems both should be chargeable. *vid. tit. Felony.*

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*Jury.*

**B**Y Glyn Chief Justice. This Court will not order the Secondary to return a Jury to try a Cause at the Assizes, except both parties consent; for this were to thwart the ordinary course of proceedings. But in Causes that are to be tryed at the Barr, the Court ~~will~~ upon good cause shewed by either party why it should be so, will order the Secondary to do it.

It was said by Glyn Chief Justice. Mich. 1658. That the Court may direct the order of swearing of the Jury upon a tryal at the Bar, contrary to that order that the Jurors are returned in the Panel. Nota: for it is very rarely done.

The Court was moved, that a Jury of Merchants might be returned, to try an issue between two Merchants, touching Merchants affairs, and it was granted. Hill. 21. Car. B. r. Because it was conceived, they might have better knowledge of the matters in difference which was to be tryed, than others could who were not of that profession.

A Jury may find a thing which is not given unto them in evidence, if they do know it of their own knowledge. Mich. 22. Car. B. r. For they may enform themselves of the truth of the fact they are to try, by all possible and lawful means they can, and are not solely tyed to the evidence given at the barr.

A Jury may take notice of a matter of Record, but they cannot try it. Mich. 22. Car. B. r. For a Record must be tryed by it self, and judged of by the Court.

In

In every Case where there is to be a special Jury returned, there ought to be a special Writ of *Venire facias* to summon that Jury. *Mich. 22. Car. B. r.*

If more than twelve men be returned upon a Jury, and do appear, the first twelve that stand in the panel, are to be sworn, and to try the Cause. This is the usual course ; *sed Q.* Whether it be of necessity it should be so, since they are all supposed to be indifferently returned. *Pasc. 23. Car. B. S.* This is true if none of them be challenged ; but if some of them be challenged, and the challenge is also made good against them, then so many more of those that remained above the number of twelve, shall be taken in, in order as they are ranked in the panel, to fill up the number that wanteth, to make it a full Jury.

If a Juror do inhabit in a house that is in the Parish of *Dale*, and do occupy Lands that do lie in the Parish of *Sale* next adjoining, and he is returned upon a Jury as of the Parish of *Sale*, this is well enough although he do not dwell in *Sale*. *Pasc. 23. Car. B. r.* For he shall be said to be as well of the Parish where the Lands lie which he occupyeth, as of the Parish where he inhabits : for he is a parishioner in *Sale*, though an inhabitant in *Dale*, and he may as well be said of *Sale* as of *Dale*.

If more than twelve men do appear at a trial, after twelve of them are sworn, the rest that are not sworn, must not continue upon the stand with those that are sworn, but must depart. *Pasc. 23. Car. B. r.* They may not be hindered in attending to the evidence, or any thing spoken to them privately, to sway them further than the evidence will direct.

The Court may give the Jury leave to drink at the Bar, after the evidence is given to them, and before the verdict, if the Plaintiff and Defendant will consent unto it. *Pase. 23. Car. B.r. But they may not drink out of the Court. A Jury had leave to drink at the Bar, after a long evidence given, in a very hot day, in Easter Term above-said, by the consent of the Plaintiff and Defendant.*

In Cases, where it is conceived an indifferent Jury will not be returned between the parties by the Sheriff of the County where the venue lies, the Court upon motion, will order the Sheriff to attend the Secondary of the Office with his Book of the Freeholders of the County where he is Sheriff, that he may see an indifferent Jury returned. *Trin. 23. Car. B.r. But there may be probable matter shew'd to the Court why an indifferent Jury may not be had, else the Court will make no such Rule.*

A Jury cannot try a Consideration to ground an Assumpsit upon, if the Consideration was given or acted out of that County where the action is tryed. *Trin. 23. Car. B.r. For this were to try a matter of Fact, whereof they have no consufance.*

Upon a motion and an Affidavit made in Court, that the Cause to be tryed at the barr, is a Cause of very great consequence, the Court will make a Rule for the Sheriff to return 48. Jurors upon the Jury. *Trin. 23. Car. B. r. That each party may have liberty of challeng, and yet a sufficient Jury remain.*

A Tenant that is within the distrefs of a Lord of a Mannor or Leete, ought not to serve upon a Jury, in Cause that concerns the Lord. *Mich. 23. Car. B.r. It shall be presumed, he may not be indifferent, in regard*

regard of fearing to displease his Lord, under whose distress he lies.

After a Juror is sworn, he may not go from the bar, until the evidence be given, and the directions of the Court, for any Cause whatsoever, without leave of the Court : and although he have leave, he must have a keeper with him. *So cautious is the Court to prevent all suspicion of sinister proceedings in the tryal of Cause.* Pasc. 24. Car. B. r.

If a Juror be challenged, and the challenge entred by the Secondary, that Juror cannot be after that sworn as a Jury man, to try that Cause wherein he was challenged, viz. at that tryal ; although the party will waive his challenge, if there be Jury men enough besides to try the Cause ; but if there be not, then the cause of challenge must be shewed, and tryed, and if it be found no good challenge, he may be sworn. Pasc. 24. Car. B. r. Q. *Whether before the challenge entred, he may be sworn.*

Where a tryal is to be, for a thing that concerns the Under-Sheriff, there the High-Sheriff shall retorne the Jury. Trin. 24. Car. B. r. For here shall be no favour supposed ; but if the tryal concern the High-Sheriff, the Under-Sheriff shall not retorne the Jury, for there may be presumed to be favour : for the servant depends upon the master, and not the master upon the servant. Q. *tamen : for the master may favour his servant.*

The Jury ought not to have any writing with them when they go from the Barr, which hath not been proved, although such a writing hath been given in evidence unto them. For though it be given in evidence, yet if it be not proved, nothing can be directly concluded from it, and therefore the Jury

*Jury is not to have it to guide their Consciences by. Mich. 24. Car. B. r.*

The Jury may find matter of Record, if they do know it of their own knowledge. *For example, if the Jury do know that John Stile levied a fine of his Lands in Dale to I. N. they may find it that such a fine was levied. Pasc. 1650. B. S. 10. Maii. For a mans own knowledge is more certain than any evidence can be given.*

There are three grand-Juries returned every Term to serve in this Court, every Jury consisting of 16, 17, 18, 19, or 20. Jurors, or more, to enquire of Offences Criminal committed in the several parts of the County of *Middlesex* through the whole County. *The reason why there are three Juries is, because there are three Hundreds in Middlesex, and for every several Hundred, there is a particular Jury returned to serve for that Hundred only.*

Though a man be very aged, yet if he be of an able body, and not infirm, he is not to be excused from serving upon the grand Jury.

One *Butler*, a man of 72. years of age, was denied by *Rolle* Chief Justice, to be excused to serve, because he was of an able body, and had his senses and understanding perfect. *Hill. 1651. B. S.*

One that hath no Freehold in the County, or is a Constable, or a Surveyor of the high-way, is not thereby to be excused from serving upon the grand Jury. *For small excuses must not serve to protect men from serving the publick, which is to be preferred above any private interest. Pasc. 1641. B. S. By Rolle Chief Justice.*

The Jurors that appear at a tryal, shall not have their charges allowed them, if the Cause be not tryed



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for want of Jurors. *Pasc. 1652. B.S.* For their appearance is of no benefit to any body; and therefore it is no reason they should receive any recompence.

When a Juror is withdrawn, he is strook out of the panel by the Secondary.

241, 1.

Upon a general issue, the Jury may find a Record, but not upon a nul tyell Record. *Pleaded 1651.* For there the Record must be tryed by it self.

If but eleven of the Jury be sworn, if the twelfth man do stand by, and hear all the evidence that was given to his fellows, he may be sworn afterwards, and pass upon the tryal. By Rolle Chief Justice. *1654. Pasc. B. S.* For the Jurors are sworn to try the issue, upon the evidence they shall hear; so that it seems in favour of tryals, the time of the Jurors being sworn is not material, whether before or after the evidence. *Q. tamen, for this is very rarely done.*

The Jury may take Depositions taken in Chancery, and exemplified there, given in evidence to them, from the Barr with them: but if they be not exemplified, they may only look upon them in Court, but not take them with them out of the Court. *1654. B.S.* For to see them, is no more than to hear them read, and they are not so authentical if not exemplified.

### *Issue.*

In the Case of *Wood and Fetherston. Trin. 1657.* It was said by the Court. That if the Defendant doth plead, and the Plaintiff replies and denies the Plea, the Defendant ought to make up the issue; for by the replication and denial of the Plea, a new issue is tendered by the Plaintiff.

Every

Every Issue is to be joyned in such a Court that hath power to try it, otherwise the issue is not well joyned. 21. Car. B. r. *For if the Cause cannot be tryed the issue is fruitless, and if it be tryed, the tryal is coram non Judice, and so no good judgment can be had upon it.*

If an Action of Trespass be brought against two for entring into the Plaintiffs Land, and one of them pleads that the Land is his freehold, and the other that he entred into the Land by the commandment of him that pleads it is his freehold, here is to be but one issue joyned. 21. Car. B. r. *For but one of the Defendants claimes an interest in the Land, and the other justifies but as a servant unto him, and if the tryal pass for him that claimes the interest, there is no colour of Action to be maintained against the other, and if the issue be ~~not~~ found against the Defendants, they shall be found guilty of a joynt trespass, for which there needs but one issue to be joyned.*

If the Defendant pleads to issue, and the Plaintiff neglect to enter it the same Term Issue is joyned, the Defendant within the first five daies of the next Term may alter his Plea, and plead de novo any other Plea what he pleaseth. Per Magistrum Livesay, & alios &c. Pasc. 21. Car. 2di. Reg.

If there be a Demurrer to an evidence, and the party whose evidence is demurred unto do plead to the demurrer, and joyn Issue with the Defendant upon it, this Issue must not be joyned upon a matter in fact in the evidence, but all the matters of law given in evidence must be agreed, or else the Issue

is not well joyned ; for the Court are not to try matter of fact, for that would be for them to give a verdict. *Mich. 22. Car. B. r. Whereas the Court are only to declare the Law, whether admitting that all the matter given in evidence by the Plaintiff be true, it doth prove the issue in question or not, which they cannot do, except all the matters in fact be agreed to be so as they were given in evidence.*

By the Rules of the Court, if the Plaintiff will not try his issue after it is joyned, in such time as he ought by the course of the Court to do, the Defendant may try it by Proviso if he will. *Hill. 22. Car. B. r. That he may free himself (if he can) of the danger and trouble he may be subject to, by the depending of the Action brought against him, and to recover his Costs for his unjust vexation. This is given by the Statute.*

A Judgment may be entred as to one part of an Issue, and a *nolle prosequi* to another part of the same Issue. *Pasc. 23. Car. B. r. This is only where the Issue may be divided. A nolle prosequi is, when the Plaintiff causes it to be entred upon the Roll that he will prosecute no further, and is as much as to say in Latin nolo prosequi.*

256, 5. \* Where there is a Demurrer to one part of an Issue, and the other part of it remains to be tryed by Jury, the Tryal of it may to be either before, or after the arguing of the Demurrer at the Election of the Plaintiff. *Pasc. 23. Car. B. r. For the Demurrer and the Issue have no dependency one upon the other for one part concerns matter in fact, and the other matter in Law.*

Every issue ought to be joyned upon the most material thing in the Cause depending, that all the matter

matter in question between the parties, may be tried.  
*Hill. 23. Car. B. r. For else the trial will prove a  
 little purpose; because the matter in question will rest  
 undetermined.*

If an Issue be once joyned between the parties,  
 this issue cannot afterwards be waved, if it be a good  
 Issue, except both parties do consent unto it, al-  
 though the Issue be but in paper, and not en-  
 grossed in parchment. *Trin. 24. Car. B. r. Therefore  
 it is good to be well advised before the Issue be joyned.*  
*sed Q.*

The place ought not to be made part of the Issue  
 in a transitory action. *Trin. 24. Car. B. r. For the place  
 is not material, as it is in a real and mixt Action: for in  
 a transitory action, it matters not where the party layes the  
 cause of action to be.*

An immaterial Issue joyned, which will not bring  
 the matter in question to be tried is not helped after  
 Verdict, by the Statute of *Je. fails*, but there must  
 be a Repleader, but an unformal Issue is aided by  
 the Statute, and so it was adjudged. *Mich. 18. Car.  
 2di. Reg. in B. r. Inter Walsingham & Combe. Intra  
 Trin. 17. Car. Rot. 1575. 26. Jan. Hill. 1649. Pasc.  
 1650. 4. Maii. B. S. For this is matter of substance; for  
 if there was no Issue, there could be no Verdict, and so it  
 is, as if nothing were done in the Cause; and therefore  
 there must be a new pleading to bring the matter in que-  
 stion to an Issue.*

If there be two Issues joyned in one cause, and  
 one of them is a good Issue, and well joyned, and  
 the other is not a good Issue, but ill joyned, and up-  
 on tryal of the cause, entire Dammmages are given  
 upon both the Issues, this is erroneous. *31. Jan.  
 1649. Hill. B. S. For here are Dammmages given, for a*

matter, which is not rightly tried for want of joyning a good Issue to bring it in question, and so the damages being entire for both Issues, that which is well tried is vitiated, and the verdict to no effect as to it.

An affirmative on the one part, and a negative on the other part, although it be but an implied negative, do make a good Issue. 15. Maii. Pasc. 1650. B.S. For an implied negative, doth deny what is affirmed, although not so plainly, as an expresse negative doth, and so there is a negative, and an affirmative to make an Issue.

When a Plea is pleaded to the Plaintiffs Declaration, and the Plaintiffs Attorneys hand, is set to this Plea, then the Issue is joyned betwixt the Plaintiff and Defendant, and not before. 6. Feb. 1650. B.S. For then both parties are agreed of the matter in question betwixt them.

By Glyn Chief Justice. Hill. 1655. It hath been held to plead *non est factum*, is a general Issue in an Action of Covenant. 2.

### *Judgment.*

419, 2.

259, 3. 258.

It was said, Pasc. 1657. B. S. By Herne Secondar and Tho. Fell an ancient Clerk of this Court, That a Judgement upon a *nihil dicit*, ought not to be entred by the Rules of the Court, until two Rules have been given in the Office for the Defendant to plead.

An erroneous Judgment in Chancery is reversible in the Kings Bench. Dyer. 315. *quod n.*

Upon a Recovery in any Action, where the Plaintiff doth declare for a thing done, *vi & armis*; the Judgment ought to be entred with a *Capiatur* for

Fine for the King ; but in an Action upon the Case, where the Plaintiff is not to declare with a *vi & armis*, there the Judgement against the Defendant ought to be, that he be *in misericordia*. 21. Car. B.r. The *Capiatur* which is imprisonment of the Party, and the Fine for the King, are for the breach of the Publick Peace, which every Action *vi & armis*, doth imply : But Trespasses on the Case do not so, and therefore there the Party is only to be amerced, and not to be imprisoned or fined, and this is the reason of the different entry of the Judgments. 251. p. 3.

A man is to have Judgment by this Court, to lose his hand, Lands, and goods, and perpetual imprisonment, for endeavouring to strike a Judge sitting in Judgment, or striking a Juror in the presence of the Judge, or for striking in *Westminster Hall* sitting the Courts. 22. Ed. 3. 13. Fitz. Judgment. 174. Stamsf. 38. So is it of one that rescueth such an offender. 22. Ed. 3. Ass. 25.

Where there are several Judgments against the defendant, one of those Judgments may be reversed as erroneous, and yet the other Judgments stand in force. 21. Car. B.r. This is meant where there are several distinct Judgments entred upon Record.

All erroneous Judgment given by the Judges of Assize is reverfable in this Court. Dyer 250.

All Judgments, given in any Court of Record, ought to be entred in Latin : And if they be in English they are reverfable by a Writ of Error. 21. Car. B. r.

No Council ought, by the Rules of the Court, to move any thing in arrest of Judgment, except the Roll, wherein the Judgment is entred, or the *Postea* be in Court. 22. Car. B. r. That the Court



may be satisfied, that the matter moved, in arrest of Judgment, is truly recited from the Record ; for the Court will not rely upon the allegation of Counsel at the Bar.

There is difference between a customary Judgment, and a Judgment given, according to the Common Law. *Trin. 22. Car. B. r.* A Customary Judgment is a Judgment given within some particular Jurisdiction by virtue of some Custom used there.

It is sufficient matter for the Defendant to move in Arrest of Judgment, to prove that he had not sufficient notice given unto him of the tryal, before the tryal, according to the Course of the Court. *22. Car. B. r. Hill. Viz.* to stop that Judgment, and to obtain a Rule for a new tryal upon the old pleadings.

If a Judgment be given which is erroneous, and the Plaintiff do take out a *Scire facias*, upon that Judgment, and have a Judgment upon that *Scire facias* : the Judgment upon that *Scire facias* is erroneous also. *Mich. 22. Car. B. r.* For if the foundation be naught, that which is built upon it, must needs fall, and here the first Judgment is the ground of the second, which being erroneous, the second cannot be good.

A Judgment which is given, contrary to the Verdict, which was found in the Cause, is a void Judgment. *Mich. 22. Car. B. r.* For the Judgment is to be warranted by the Verdict, and is but the affirmation of the Verdict, and therefore it must not contradict the Verdict, but concur with it in all things.

The Court will not reverse a Judgment, which is given upon a *Nihil dicit*, and by the Rules of the Court, upon a motion, although the Plaintiff and Defendant do desire it, but by the Consent of the Plaintiff.

Plaintiff and the Defendant, the Court will grant a Repleader in the Case. *Mich. 22. Car. B. r. That the matter in question may come to be tryed; which by the Judgment upon the Nihil dicit was never try-*

If a Verdict be given after the Term, no Judgment can be given upon that Verdict, until the next Term following. *Mich. 22. Car. B. r. 23. Car. B. r. For such proceedings in the Law, ought not to be in the Vacation time, but in Term time; for the Judgment is the Act of the Court, and the Court sits not, but in Term.*

If a Judgment be obtained, but the Plaintiff doth take out no Execution upon this Judgment, in a year and a day next after the Judgment given: The Plaintiff cannot then take out Execution, until he hath revived this Judgment by a *Scire facias*, which *Scire facias* is to give notice to the Defendant to shew cause why the Plaintiff should not take out Execution upon the Judgment, which Writ he may have without motion, by the Course of practice of the Court; but if there be a Judgment above ten years old, upon which no Execution hath been taken out, such a Judgment cannot be revived by a *Scire facias*, without a motion and leave of the Court, that the Court may thereby be put in mind of what was formerly done. *Mich. 22 Car. B. r. But the Court doth not use to deny a Scire facias in such a case.*

If the Defendants Atturney do enter a Plea for his Clyent in the Office, the Plaintiffs Atturney cannot enter a Judgment against the Defendant upon a *Nihil dicit*, or for want of a Plea, although the Plea be not given unto him by the Defendants Atturney.

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torney. Mich. 22. Car. B. r. and Pasc. 24. Car. B. r. For the Office is the place where the Attorneys on both sides are to inform themselves of the proceedings in their Clyents Causes ; and the delivery of Declarations and Pleas, &c. by one Attorney to another in their Clyents Causes, is rather matter of courtesie and civility, than of any necessity or duty ; yet it is the usual practice to do it, and very rarely omitted.

452, 2.  
Four days after the Plaintiffs Attorney doth bring the *Postea* into the Court, if the Rule for Judgment is out, he may enter Judgment for his Clyent by the course of the Court, Mich. 22. Car. B. r. Except the Defendant do then, or before, move something to the Court to arrest of, or to stay Judgment, but no Judgment ought to be entred before a Rule be given upon a verdict, and such Rule out, but upon a non prof. there is no need of any Rule.

9<sup>th</sup> Nov.  
Where a Judgement is arrested only for mispleading, there the Court will grant a Repleader. Mich. 22. Car. B. r. To the end a good Judgment may be given, which cannot be upon an ill Pleading.

A Judgment was reversed in this Court, for tautology used in it, Mich. 22. Car. B. r. That is, for repeating the same thing over and over. For the Law will not suffer Barbarismes in the proceedings thereof ; they will in the conclusion bring all things into confusion.

356, 1.  
If a Judgment be unduly obtained, and sufficient proof thereof be made unto the Court, the Court will vacate the Judgment, and restore the party damnified by it, to be in the same condition that he was in before the Judgment. Mich. 22. Car. B. r. Without putting him to a Writ of Error. Pasc.

Car. B. r. For the Court will not be made a stale to do any person injury, and the Court will also punish the party that used the falsity to obtain it.

If one will take advantage of a Defeasance of a Judgment, to avoid the Judgment, whereupon it was made, he must plead this Defeasance in Court, otherwise the Court cannot take notice of it. *Mich. 22. Car. B. r.* For the Defeasance is a private thing between the Parties, and no part of the Record; but by pleading it, it becomes a matter of Record of which the Court may take notice.

A Judgment in an Action of Detinue, is given conditionally, that is to say, that the Plaintiff recover the thing it self, which is detained, if it may be had, but if it may not be had, that then he recover Damages for the thing. *Hill. 22. Car. B. r.* viz. Damages to the full value of the thing it self, and also for the Detaining of it, if there be any such Damage.

Wheresoever the Defendant is upon the Judgment to be fined to the King, there the Judgment is to be with a *Capiatur*, but where he is not to be fined, there the Judgement shall be, that the Defendant be in *Misericordia*. *Hill. 22. Car. B. r.* The *Capiatur* is to take the party, and to imprison him till he pay the fine. To be in *Misericordia*, is to be amerced in his goods for the injury done against Law to the party at whose suit he is condemned. 246. p. 6.

Though a Judgment be legally signed, yet if it be never entered it is no Judgment. *Hill. 22. Car. B. r.* For every Judgment must be matter of Record, but before the entry it is not so, the signing of the Judgment, is not the leave of the Master of the Office for the Attorney to enter the judgment for his Clyent, By

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By the course of the Common Pleas, a Surety that is bound with one in an Obligation, may plead for the principle to an Action brought upon this Obligation, and acknowledge a Judgment against him; for they make no distinction betwixt the Principal and the Surety in an Obligation, but accompt it the joynt debt of both. But this seems very hard, and this Court will not admit of such practice. *Pasc. 23. Car. B. r.* *It is said, that now the Common Pleas will not suffer it, but do agree in their practice in this point with this Court.*

254. 4. The Defendant hath all the Term, wherein a Verdict was given against him to speak any thing to arrest it, ( if the Plaintiff hath not given his four daies Rules, and signed his Judgment, which if he hath, then it is too late to move, and the Defendant is put to his Writ of Error ) for the Judgment is at the Term, wherein it was given in the breast of the Judges, although it be entred upon Record, *Pasc. 23. Car. and 24. Car. B. r.*

A Judgment may be entred, as to part of an Issue, and a *Nolle prosequi* may be entred, as to another part of it. *Pasc. 23. Car. B. r.* *This is where an Issue may be divided.*

When at a tryal the Defendant is called ( which is used to be done three times distinctly by the Clerk of the Court ) and he doth not appear, Judgment shall be taken against him by default. *Pasc. 23. Car. B. r.* *That is for not appearing to make his Defence; for the Law will presume he is guilty, and he has no Defence to make; but the Plaintiffs Counsel may pray it may be so taken, for the Court doth it not ex Officio; yet the Defendant may afterwards give matter in Evidence.*

If Judgment be given for more than the Plaintiff doth demand in his Declaration, this Judgment is erroneous. *Pasc. 23. Car. B. r.* For to give one more than is his due, is as equal Injustice, as to deny any one that which is his due. And it shall be presumed, that the Plaintiff best knows what is his due, and will demand it to the full, or if he should not, yet it sufficeth, if he will be contented to demand less.

If an Action of the Case be brought against one for speaking of divers, distinct, scandalous words of another, and the Damages are laid severally for them, viz. so much Damages for speaking of such of the words, and so much Damages for the speaking of such other of the words, there Judgment may be given for speaking of such of the words, as the Plaintiff was damaged by, and not for the other words, by which he was not damaged; But if the Damages be laid entire, for speaking of all the words, and some of the words be not actionable, so that Damages cannot be given upon all the words, there shall no Judgment or Damages be given for any of them. For the Court cannot proportion the Damages, according to those words which were damageable, and those which were not.

Judgments given in inferiour Courts, must be entered, *Ideo consideratum est per curiam*, in words at length, and not *Ideo consideratum est*, &c. as the use is in the Courts at *Westminster*, for if they do not, they are erroneous there, though it be not so in the Courts at *Westminster*. *Trin. 23. Car. B. r.* For inferiour Courts are tied strictly to observe their ancient forms, and not to vary from them; for if they should be permitted to vary from them, many inconveniences would quickly follow by the unskilfulness of the Clerks, to the great prejudice of the people.

The



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The Judgment in an inferior Court was entred, *Judic. concess. est per Cur.* whereas it ought to have been *considerat' est per Curiam*, and for this cause reversed. *Rain versus Atkinson. Mich. 16. Car. 2di Regis, in B.R.*

Although the Plaintiff have signed his Judgment against the Defendant, yet he may waive it, if he will, and accept of a Plea from the Defendant. *Trin. 23. Car. B. r. and 24. Car. B. r.* For the signing of it doth not make it a Record of the Court, but if it were entred, he could not waive it without leave of the Court.

A special Judgment is, where one brings an action for divers things, as for example, A man brings an *Ejectione firme pro tofto crofto, &c.* and the Plaintiff hath a Verdict upon the whole Declaration, and doth waive some one or more of the other things for which the Action is brought; in such case he must release his Damgages to all, and yet he may have his Costs of Suit. *Trin. 23. Car. B. r.* For the Costs have no relation to the Damgages, the Damgages are given entirely by the Jury; but the Costs of Suit are increased and signed by the Master of the Office who can best judge of them.

If a Verdict pass for the Plaintiff, and the Plaintiff will not enter his Judgment upon this Verdict, the Defendant may enter it, and so it is of a Writ of Enquiry of Damgages. *Trin. 22. Car. B. S.* If the Plaintiff will not file it, the Defendant may do it. For the Plaintiff ought to be content with what the Law gives him; and if the Defendant might not enter it, he should be hindred from pleading it in Bar to another Action brought against him for the same cause as the Law allows him to do.

If a Clark of this Court will not appear to an Action that is brought here against him, the Plaintiff may enter Judgment against him by *nihil dicit*. By Woodward Clark of the Court. For a Clark in Court is supposed to be alwaies present in Court, and there if he will not appear, yet it seems it shall be all one as if he had appeared and refused to plead, Trin. 23. Car. B. r.

The Court will not give a Judgment, which they know would be against the Law, although the Plaintiff and Defendant do agree to have such a Judgment given. Trin. 23. Car. B. r. For the Judges are to do equal justice according to their best skill, and not to err willfully, and against their knowledge to please the parties.

If the Plaintiff will not bring in his *Postea* into the Court according to the Rules of the Court, that the Defendant may have time to speak in Arrest of Judgment; and the Defendant do make proof of this to the Court upon oath; the Court will Arrest the Judgment until the Plaintiff shall move for Judgment. Mich. 23. Car. B. r. And he may thank himself for his trouble and delay, by not bringing in his *Postea*, as he ought to have done. The like Law is in case of a Writ of Enquiry, &c. 252, 2. 250, 1.

Judgment cannot be entred until four daies after the *Postea* is brought in and entred in the Office, that the Defendant may have liberty to offer what he can find out of the Record to arrest the Judgment, which is counted a convenient time for him to do it, but after that if nothing be spoken in the mean time to arrest the Judgment, it may be entred. Mich. 23. Car. and Pasc. 24. Car. B. r. For then it shall be presumed he had nothing to say to stop the Judgment.

If

250, 4.

If a Judgment be entred contrary to the Rule of Court, made to stay the entry of it ; the Court upon motion will vacate the Judgment and amerce the party that entred it. *Mich. 22. Car. B. r. For his disobedience to the Court.*

Where a Verdict is imperfect, there can be no Judgment given upon it ; but the Court will grant a new *venire facias* to summon another Jury to try the issue again. *Mich. 23. Car. B. r. For the parties shall not be compelled to go further back in their proceedings than where the error was made, and that was by the Jury, in finding an imperfect Verdict.*

*aff. Re-  
ord.*

If one bring a writ of Error to reverse a Judgment given in the Common Pleas, and do not remove the Record by a *Certiorari*, the Plaintiff may ~~move~~ in the Common Pleas <sup>take out</sup> for Execution, notwithstanding the Writ of Error brought. *Mich. 23. Car. B. r. Because he hath made no proceedings but upon the Writ of Error, and so it may be accounted but colourably brought, and for delay. But Q. Whether they will grant it, because by the Writ of Error, their hands are foreclosed; but now by the late Act a Writ of Error is no Superseas, and so the Law in this point is altered.* ☞

In a Judgment given for the Plaintiff to recover a sum of money, the sum must not be written in figures, for if it be it is error, but it must be expressed in words at length. *Mich. 23. Car. B. r. For a Judgment consists in words, and words are made of letters and not of figures which can spell nothing, and figures may easily be altered.*

244, 3.

If a Judgment be given upon an Issue tried in a cause wherein there is also matter of Law in dispute upon another issue depending in that cause before the

matter

matter in Law be determin'd, yet the Judgment is good. *Hill. 23. Car. B. r. For the Causes have no depending one upon the other.*

Upon the Affirmance by the Parliament of a Judgment given in this Court, and removed by a Writ of Error brought in Parliament to reverse this Judgment; the Parliament useth to have a *Remittitur* entered upon the Judgment Roll, to send it back into this Court, that this Court may award Execution upon the Judgment. *Hill. 23. Car. B. r. For Execution ought alwaies to Issue out of this Court where the Judgment was given after the affirming thereof, and the Writ of Error was only to try whether the Judgment was good, and not to alter the way in taking out of Execution.*

If a prisoner which is Endicted for Felony will not plead to the Endictment, he is by the Law to be pressed; but if a prisoner endicted for Treason, will not plead at all to the Endictment, or answers impertinently, and not to the purpose, judgment shall be given against him, as if he were found guilty. *Pasc. 23. Car. B. r. By Rolle Justice. In Sir John Stowels Case as remember. Q. differentiam. It seems to be in respect of the heinousness of Treason above Felony.*

If a *Postea* is returnable in Court the last day of the Term, although the Defendant cannot have four days liberty to speak in Arrest of Judgment, yet by the course of the Court Judgment may be given in the same Term; unless the Defendant shall Arrest Judgment, upon the same day it is returnable. *Pasc. 24. Car. B. r.*

If a Judgment be but 7 years old, the party may <sup>249.2</sup> move the court of the Court, have a *Scire facias* to remove it without moving of the Court for it, and if the Judgment be under ten years old, the party may move for

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for a *Scire facias*, to revive it at the side Bar, but if it be ten years old or more, a *Scire facias* to revive it, must be moved for in Court. *Pasc. 24. Car. B. r.*

263, 5.

One may speak in Arrest of a Judgment given upon a *nihil dicit*, at any time during the same Term that the Judgment was obtained, before execution taken out. *Pasc. 24. Car. B. r.* For the Defendant is more favoured in a Judgment given against him upon a *nihil dicit*, than where a Judgment is given against him upon a Verdict, because in the former Case he makes no defence, but in the latter case, it is intended he hath made his full defence.

Where one entire Judgment is given against two several persons, and one of them is an Infant, the whole Judgment is void. *Trin. 24. Car. B. r.* For it being void to the Infant, and being an entire Judgment which cannot be divided, it must necessarily be void as to the other, and so void in toto.

246.

If a peremptory rule be given for the Defendant to plead at a certain day, if he do not plead accordingly, the Plaintiff may enter Judgment against him, without any further moving of the Court. *Trin. 24. Car. B. r.* For it was the favour of the Court to give him that day, to plead, and if he make no good use of it, it is his own fault, and the Court will not further delay the Plaintiff.

If the Plaintiff do demur to the Defendants Plea, and the Defendant do joyn in the demurrer, if the Plaintiff will not maintain the demurrer, Judgment shall be given against him. *Trin. 24. Car. B. r.* For thereby it is imply'd that he confesseth the Defendants Plea to be good, and consequently that he hath no cause in or demurrer.



That which a Judge of this Court doth act in his Chamber, as a Judge of this Court, is accounted to be done in Court. *Trin. 24. Car. B.r. For it is in order to the proceedings in Court. Q. How far this is true.*

Where a Judgment is entire it cannot be reversed in part, and stand good as to another part, but if it be not an entire Judgment it may. *Trin. 24. Car. B.r. For an entire Judgment cannot be divided to make one part of it good and another part of it to be erroneous.*

If the Plaintiff do give the Defendant two rules for him to plead according to the course of the Court, & the Defendant do not plead, when the time of these two rules are out, the Plaintiff may enter a Judgment against him upon a *nihil dicit*, but not before. *Mich. 1644. B.r. For then it shall be intended he hath nothing to plead in barr of the Action.*

If a man bring an Action of Debt against two Executors, and they plead they have not Assets, and thereupon Issue is joyned, and it is found that one of the Executors had Assets at the time of the Action brought, but that the other Executor had not Assets the Plaintiff shall have Judgment to recover the Debt against that Executor who was found to have Assets, and a *nil capiat per billam* shall be entred against the Plaintiff, as to the other Executor, who was found to have no Assets. *Mich. 23. Car. B.r. For the possession that one Executor hath of the Testators goods is not the possession of the other Executor, and so may have Assets, and the other not.*

It is against the course of practice in this Court to admit the principal, to acknowledge a Judgment for Bail; but in the Common Pleas they use to admit. *Mich. 1647. B. S. But it is said that the Com-*



*mon Pleas will not admit it now since the rules of regulation made in that Court.*

If the Defendant give a Judgment with stay of Execution till a certain day, the Plaintiff may notwithstanding such stay of Execution, sue forth a Capias, or fi. fa. into the County where the Action is laid, retognable befoze that day, to enable him at that day to take a Testatum against the Defendant; but he shall not in that Case sue out a Capias to warrant a Scire facias against the Bail, unless by special agreement; because it is to the prejudice of a third person, and the Capias ad satisfaciendum, in that Case, ought to be delivered to the Sheriff four daies befoze the Return be past. Per Magistrum Livesay, & alios, &c. Pasc. 21. Car. secundi Reg.

If in an Action of Trespafs and Ejectment brought to try the title of the Land, the owner of the Land, whose title is concerned, will not save the party that is made Ejector, harmless from all prejudice that may befall him by reason of the Suite; he may confess Judgement unto the Plaintiff, for the Land in question. Mich. 1650. B. S. For to avoid further trouble and charge by reason of the suite which concerns him not, either in gain or loss; but if the owner of the Land will save him harmless, the Court will not suffer him to confess a Judgment.

If a Judgment is given, which is not warranted by the Verdict upon which it is given, that Judgment is not good. Mich. 1649. B. S. For the Verdict ought to warrant the Judgment, for the Judgment is but in affirmation of the Verdict.

If a Judgment given in an inferior Court, be not according to the ancient form of Judgments given there: such Judgment is erroneous, and this Court will reverse it upon a Writ of Error brought. *Pasc. 1650. 24. Maii. B.S.* For inferior Courts must observe their ancient forms.

It is dangerous to take a Judgment acknowledged in the Vacation, as of a preceeding Term; and it ought to be made a Judgment of the subsequent Term. *Mich. 1649. B. S.* Yet it is common practice to do it.

If a Warrant of Attorney to confess Judgment be made, without mention of any Term when the judgment should be, it shall be intended the next Term after the date of it. *Hill. 16. Car. 2. R. in B.R.*

If one be Out-lawed in an Action brought upon a Judgment by a *nihil dicit*; and that Out-lawry is reversed by a Writ of Error, the Judgment is also to be reversed. *Mich. 1649. B. S.* For it seems one may not be twice Out-lawed upon one Judgment, which might be if the Judgment should not be reversed, for the Plaintiff might bring a second Action upon the same Judgment, & Out-law the Defendant again. yet the reversing of an Out-lawry, is only to restore the person Out-lawed, and his estate to the benefit of the Law; which reversal shall not prejudice or take away the Plaintiffs cause of Action. But if a man is out-lawed upon an Exigent prout *capias ad satisfaciendum*; there the Court will not suffer the Out-lawry to be reversed, without payment of the money, or reversing of the Judgment upon which it is founded.

If one take a Judgment he cannot consent to vacate it, because it is a Record. *Mich. 1649. B.R.* But he may acknowledge satisfaction upon record, and so make the Judgment fruitless.

If the Defendant in an *ejectione firme*, will not plead according to the rules of the Court, there must be Affidavit made of sufficient serving the Declaration, and then Counsel must move upon that Ejectment, to have Judgment against their own Casnee Ejector, which the Court will grant if the Affidavit is sufficient, except he which claims title, will appear and become Defendant within such time as the Court will think fit.

*Nota* : The Declaration in Ejectment ought to be delivered before the Essoin day of the preceeding Term.

*Nota* : Also that you must move the next Term after your Declaration delivered, otherwise the Court will put you to deliver your Declaration *de novo*, and the first delivery shall be void. *Hill. 22. Car. 2di. Reg. in B. r.*

A Judgment was reversed, because it was given for more than was demanded in the Declaration. *Pasc. 1650.3 Maii. B.S.*

A Judgment was reversed for these Errors, because the time when the Judgment given, was in figures. 2. Because the sum recovered was expressed in figures. 3. The *venire facias* was with an *&c.* And 4. the cause of Action did not appear by the Record to be within the jurisdiction of the Court where the Judgment was given. *1659. Hill. B.S.* This was a Judgment given in an Inferiour Court, and all these exceptions were said to be good exceptions; and each of these is sufficient to reverse a Judgment.

A Judgment was reversed because it was entred thus, *Ideo consideratum est ad eandem Cur.* whereas it ought to be *per eandem Cur.* *Hill. 1649. 30. Jan. and 11. Feb.* For it might be considered at the Court, which may

be meant only the place where the Court is held, and yet not be the Act of the Court, viz. of the Judges of the Court.

After an Issue is joyned to be tryed by the Plaintiff and the Defendant; the Plaintiff may if he will without going to a tryal accept of a Judgment from the Defendant without any Verdict in the Case, which Judgment must be by *relictā certificatione cognovit Actionem*. Pas. 1650. B.S. 21. M.ii. For the Defendant is not prejudiced by it, if he will acknowledge the Judgment, and the Plaintiff could have recovered no more if he had had a Verdict, and he may waive his costs if he please.

If a thing be entred in a Judgment, which is not mentioned in the Plaintiffs Declaration, upon which the Judgment is given, the Judgment is not good. Pas. 1650. B.S. Because it is in part given for that which the Plaintiff sues not, & so the Court had no consueance of it.

Judgment was given against one of *non sane memorie*, and held good, for by Rolle Chief Justice, the Defendant may bring a Writ of Error to reverse the Judgment and Assign this for Error. This was in the Case of *Disne and Grigson*. Trin. 1650. B.S. 26. Julii. Q. tamen, for thereby the Defendant is put to needless trouble and charge.

A Judgment ought not to be entred, until the costs be taxed, and the Judgment signed by the Secondary of the Office. 2. Julii. 1650. Trin. B.S. Because the costs are to be mentioned in the Judgment.

A Rule of Court was made upon a motion at the Bar, that the Secondary should enter a Judgment in a Cause wherein a Tryal was to be had, as a Judgment of the Term, next preceeding the Term wherein the Tryal was to be, and that the Secondary should express in the Rule, that the Rule was made by

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the consent of the Plaintiff, and of the Defendant in the cause. 2. July. 1650. B.S. For consensus tollit errorem; and otherwise the Court would not have made such a Rule to antedate a Judgment, and there was other special reason as I remember for the doing of it, besides the consent of the parties.

The Course for one to acknowledge a Judgment, is for him that doth acknowledge it, to give a general Warrant of Attorney to any Attorney or some particular Attorney of that Court, where the Judgment is to be acknowledged to appear for him at his suite, who is to have the Judgment acknowledged unto him, and to receive a Declaration from him, and to plead *Non sum informatus*, or acknowledge it before a Judge, or to let it pass by *nihil dicit*, and thereupon Judgment is entred of course for want of a Plea. 14. Nov. 1650. B.S. *Non sum informatus*, is as much as to say that he is not enformed by his Clyent what to plead for him.

A Judgment upon a *nihil dicit* is not a perfect Judgment, until the Writ of Enquiry of dammages taken out upon this Judgment be executed, (except it be in Debt, for there needs no Writ of Enquiry.) 16. Nov. 1650. B.S. For the dammages are to be expressed in the Judgment, which cannot be known what they are, until the Jury Empannelled by the Sheriff, to enquire of the Dammmages have found them; because the dammage were never enquired of by the Jury that should have tryed the Cause, if it come to a tryal upon a Plea, and an issue joyned.

When a Plea is pleaded, if the Attorney on the other side will not set his hand unto it as he ought, and joyn in the Issue, Judgment may be entred against him



him by the Defendants Atturney by default. 6. Feb. 1650. B. S.

If a Judgment in an *ejectione firmæ*, be as to the damages, & *quod recuperet Terminum*, &c. *quod recuperare debeat*, and a Writ of Error be brought to reverse this Judgment, this Writ of Error is well brought; for here is Judgment given for the present, viz. *quod recuperet Terminum*. Trin. 1651. B. S.

By Rolle Chief Justice, a Judgment ought not to be entred for want of a Councillours hand set unto a special Plea, as by the Rules of the Court there ought to be, without first acquainting of the Secondary of the intention to enter Judgment, for such a Plea without a Councillours hand, is a Plea, and it may be there needeth not a special Plea, and the party must not be his own Judge, whether it be good or no. B. S. *But the Master of the Office is to direct such matters.*

By Rolle Chief Justice, in an Action of Trespas<sup>247, 1</sup> brought *quare vi & armis*, a *Capiatur* ought to be entred upon the Judgment where the Judgment is given before the Act of Oblivion was made, but if Judgment be to be given in an Action brought for a Trespas done since the Act of Oblivion was made, and which is pardoned by the Act, *pardonatur* ought to be entred upon the Judgment; and so the Judgment in the Trespas, and the Act of Oblivion are both satisfied. 1651. B. S. *For the pardonatur doth imply he should have been taken, had not the Trespas been pardoned.*

By Glyn Chief Justice. Pasc. 1656. It is against the course of the Court to vacate a Judgment the last day of the Term.

One may speak in Arrest of a Judgment given upon <sup>256, 1.</sup> <sub>264, 2.</sub>



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upon a *nihil dicit*, after the Writ of Enquiry of damages is executed upon that Judgment. *Mich. 23. Car. B. r.* For till the Writ, the Judgment cannot be perfected.

In the Case of one *Mann.Hill. 1655. B.S.* A Rule was made, That a Judgment should not be entred upon a Verdict obtained in an Action of Debt. *13. Car.* until the Court was moved in it. *Q. del leg.*

### *Infant.*

54/67369. An Infant ought not to appear to an Action brought against him by his Attorney ; but he must appear by his Guardian. *Pasc. 24. Car. B. r.* For he cannot make an Attorney, and the Guardian is assigned (but with the consent of the Infant) by the Court. *Trin. 24. Car. B. r.* Yet if the Infant will not consent to it, the Court may assign a Guardian, or else it would be a great prejudice in delaying of justice. *Q. tamen.* But the usual way is to sue the Sheriffs Bond taken with suretyship for his appearance, which may be prosecuted till such infant shall appear by his Guardian.

If an Infant declare by Guardian, or Prochein amy, the Defendant is not compellable to plead, until the Plaintiff shews a Rule of Court for his admittance. *Per Magistrum Livesay, & alios &c. Pasc. 21. Car. 2di. Reg.*

An Action of Debt doth lye against an Infant upon his promise to pay for necessaries, as meat and drink, lodging and apparel; but if the Infant and the party from whom he had these necessaries, do come to an account, and reduce that which the Infant is indebted

debted for them, to a certain sum of money, and upon this account the party brings an Action against the Infant, for the money stated to be due by the account; this Action will not lye against the Infant.

*Trin. 24. Car. B. r. For the account upon which the Action is grounded, is void; for an Infant can agree to no such account; for the Law doth not account him a person able to state an account.*

If an Infant be sued, he cannot regularly appear or plead by Guardian without admittance, but if he do, it is only a misdemeanour in the Attorney, for which the Court may punish him if they please, but no Error. *Per Magistrum Livesay, & alios, &c. Pasc. 21. Car. 2di. Reg.*

### *Justification.*

Where the Action concerns a transitory thing, if the Defendant do justify the taking or doing in one place, this is a Justification in all places; but if the Action concern a local thing, a Justification in one place, is not a Justification in another place. *Pasc. 24. Car. B. r. For in the former Case the place is not material, but the meer doing or taking of the thing, is the substance upon which the Action is grounded; but in the latter the place is material, for the Defendant (it may be) may be able to justify the doing or the taking of the thing in one place, and yet be guilty in another place.*

### *Jurisdictions.*

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*Jurisdiction.*

The essential difference betwixt free Chappels and other Churches, and Chappels is, that all free Chappels are free from the Jurisdiction of the Ordinary. *Hill. 23. Car. B. r. So that the Ordinary is not to intermeddle with them in anything that doth concern them, or to visit them; whereas all other Churches, and Chappels are within the Jurisdiction of some Ordinary, and may be visited.*

The Jurisdiction of a Court where a cause is depending, cannot be extended further in relation to that Cause by the consent of the Plaintiff and Defendant, than of right it ought to extend. *Pasc. 24. Car. B. r. For this would be for the parties to erect (as it were) a Court which was not before, for the tryal of their cause; and by this means the Jurisdiction of every Court would grow to be unlimited, which would be inconvenient.*

This Court hath no consuance of the proceedings in Parliament. *Pasc. 24. Car. B. r. So held in John Lilburn Case; because the parliament is the supreme Court, and subject to no other Court.*

This Court hath a general Jurisdiction to reform the abuses of all persons in their behaviour throughout all England; and the abuses and miscarriages of all Courts of Justice, throughout all England. *9. Feb. Hill. 1649. B. S. 3. Julii. 1650. B. S. For the good behaviour of all persons doth much conduce to the peace of the Nation.*

If the Court of Chancery do grant a *Habeas Corpus* to a prisoner that is in the custody of the Marshal of this Court, this Court hath no power to restrain the prisoner, so long as the *Habeas Corpus* is in force. *3. July.*

July, 1650. *Trin. B. S.* In the Case of Sir Arthur Smithes and Workman. For if it should be so, this would be for the Authority of one Court to interfere with another.

This Court hath Jurisdiction over all the Courts of England in all Mandatory Writs. 10. Feb. 1650. *B. S.* Which are such Writs which proceed out of this Court, as the Superintendant Court, and Supreme Judicature.

This Court hath power to grant a *Mandamus* to a Colledge, to command them to admit a Fellow there. *Doctor Patricks Case, Trin. 18. Car. 2di. Reg. in B. R.*

### *Injunction.*

An Injunction out of the Court of Chancery doth not lye to stay execution after a Judgment given at the Common Law; although the Bill upon which such Injunction is granted, were put in before the Judgment given at Law, for although the Chancery make a difference between exhibiting the Bill before the Judgment given, and the exhibiting a Bill after the Judgment given, yet this is no good difference, for it is a like in both Cases. *Trin. 23. Car. B. r.* But the Chancery may, if there be cause, stay proceedings at Law before Judgment given, and the Chancery doth sometimes stay Execution: sed *Q. quo jure.*

### *Information.*

If by a penal Statute he that prefers an Information against another, for an offence done against this Statute, is to have half of the penalty, which shall be recovered

Recovered upon this Information, there if an Informer do prefer an Information upon the Statute, before any Information is preferred by the King; the King cannot hinder the Informer from having his proportion of the penalty given him by the Statute; but if the King do first prefer the Information, he may Inform for the whole penalty. *Pasc. 23. Car. B. r. For the King is not bound to stay till an Informer prefer the Suit, but may sue at any time, and if no body Inform, none hath right to the penalty, but the King, and therefore he may pardon it, if he please, without wrong to any.*

If the Marshal of the Kings Bench do misdemean himself in his office, to the prejudice of any person, he who is prejudiced by his misdemeanour, may prefer an Information against him in this Court. *Hill. 23. Car. B. r. And if he be found guilty upon a tryal thereupon had, he may be fined by this Court, and shall make satisfaction to the party also as it seems. Q. If the Court can put him out of his Office.*

The Clerk of the Crown ought not to set his hand to an Information without examining the cause, for which it is preferred. *Pasc. 24. Car. B. r. For if there be not (at least in probabilities) good matter in Law to ground an Information upon, the party that doth prefer it, is not to be assisted and encouraged in it; for the Law doth abhor vexatious, and causeless suites, especially in Criminal matters, which are more penal than Civil Actions.*

An Information may be preferred in this Court against the Inhabitants of any Town or Village in England for the not repairing the High-waies which by Law they are bound to repaire. *Mil. 1649. B. S.*

For this Court may punish offences done against the Weal  
Publick all England over, if other Jurisdictions be negli-  
gent to do it.

If an Information be preferred at the Suite of the  
party, there the Endictment ought to be brought  
to a tryal at the charges of the party, that prosecutes  
the Endictment; because it is intended he is to re-  
ceive a particular benefit by the conviction of the  
Defendant: but if an Endictment be preferred at the  
Suite of the King, there the Endictment shall be  
brought to tryal at the costs of the party against  
whom the Information is brought. *Pasc. 1650. 24.*  
*Maii, B. S. Q. rationem unde, it seems it is because the*  
*King is not to be put to charges in any suite which con-*  
*cerns the publick.*

Although an Information be faulty in the body of  
it, yet upon a motion the Court will not quash it,  
but the Defendant must demur to it for its insuffici-  
ency. *Pasc. 1650. B. S. 24. Maii.* But it is otherwise  
of Endictment, the difference seems to be, because In-  
formations use to be preferred for greater offences and  
more pernicious to the Common wealth, than Endictments  
usually are.

### *Justice of Peace.*

A man may be a Justice of Peace in one part of  
Yorkshire, and yet not be a Justice of Peace in every  
part of the County. *Hill. 22. Car. B. r.* For York-  
shire is divided into divers parts, called Ridings,  
viz. into the East Riding, West Riding, and North  
Riding; and he may be a Justice of Peace in one of those  
Ridings, and yet not a Justice of Peace in another of  
those Ridings; but generally a Justice of Peace of a  
County.



*County, is a Justice of Peace all the County over; although it be not so in York-shire, by reason of the large extent thereof, which is thus divided for the more easie, and better government thereof.*

The Peace was prayed upon Articles read in Court against one, one of which Articles was that the party against whom the peace was prayed, did threaten that he would burn down the house of him that prayed the peace; and upon that Article it was granted. *Hill. 21. Car. B. r. And upon good reason; for though words are but wind; yet they often cause the breach of the peace, and threatening words do mostly proceed from malice prepensed, which is apt to break out into open violence. To grant the Peace against one, is to grant that the process of the Court may issue out of the Crown Office against him, to bring him into the Court, to find Sureties to be bound with him in a recognisance to the King to keep the peace towards all the Kings Liege people, but more especially towards the party that prays the Peace.*

A Justice of Peace ought not to bind any person to the good behaviour, upon a general information, and if the party accused, doth refuse to be so bound, and find Sureties to be of good behaviour; yet the Justice of Peace ought not by the Law to send the party to the Gaol for refusing it. *Pasc. 23. Car. B. r. For he that desires to have one bound to the good behaviour, must shew some particular miscarriages, wherein the misbehaviour of the party consists; for accusatio generalis est nulla, for no defence can be made to it for the uncertainty thereof.*

The Justices of Peace ought by the duty of their places to attend at the Assizes, and at the publick Sessions of the Peace, held for the County, whereof they

they are Justices. *Pasc. 23. Car. B. r.* To dispatch the publick business concerning the Peace and good governing of the County.

The Commission of Oyer and Terminer doth extend to those that are Justices of the peace. *Pasc. 23. Car. B. r.* *Q. Whether it be generally so to all, it seems not.*

A Justice of Peace may actually Arrest and commit the party to prison, that doth a Felony in his own view, without any warrant made under his hand and seal to arrest him; for there needs not other proof of the matter; but if there be an information made to a Justice of Peace, that one hath committed Felony, there the Justice must make a Warrant under his hand and seal to Arrest the Felon, and he may not do it by word of mouth. *Q. 1650. B. S.* For it must appear by what authority the party was committed.

It is usual in the Crown Office, if one be bound to the peace there, to keep him bound to the peace during his life. But by Kollé Chief Justice, there is no reason why this should be done, *13. Maii. 1651. B. S.* For the party may become reformed, and so no cause to continue him bound and his Suerties for so long a time. If suppose it is done for the benefit of the Clerks of that Office, and sometimes at the desire of the party, for some particular reason,

A Justice of Peace may require a Bond or Recognizance of a thousand pound of one for his keeping the peace if he see cause for it, in regard that the party to be bound, is a dangerous person, and likely to break the Peace, and to do much mischief. *Pasc. 1652. B. S.* For there cannot be too much caution used in preventing the breach of the Peace in such cases.

This Court will bind one to the Peace if they see cause to do it, although there be no Oath made by any person against him that is to be bound, that he goeth in fear of his life of him. *Trin. 1652. B.S.* For the Oath of a party is but to manifest unto the Court, that there is just cause why the party should be bound unto the Peace, and therefore if the Court be sufficiently satisfied without such an Oath that there is good cause to bind the party to the peace, they may do it without such an Oath: For where things are in themselves manifest, there needs no evidence to prove them.

If one do take his Oath in this Court against another, that he doth go in fear of his life of him, and prays the peace against him, he against whom the peace is thus sworn, and the Peace prayed, ought to be committed to prison, if he do not find Sureties to keep the peace, although there be no Articles exhibited and sworn against him. *1652. B.S.* For there appears sufficient cause by the Oath for the Court to do it, though there be no Articles exhibited, as the usual course is to do.

### Issues.

If the Defendant give the Plaintiff a Rule to enter his Issue, the Action being in London, or Middlesex, the Plaintiff must bring in his Record into the Office, within four daies after notice of the Rule, and if the Action be in the County, he must bring it in before the continuance day of that Term, or in Default thereof, a non-suit may be signed and entered. Per Magistrum Livesay, & alios &c. *Pasc. 21. Car. secundi Reg.*

In Actions lying in London or Middlesex, the Defendant ought not to give the Plaintiff rule to enter his Issue, or to try the Cause by Proviso the same Term issue is joyned, unless the Plaintiff hath first given the Defendant notice of trial that Term, and hath made default, and if the Action lye in the County, the Defendant shall not give the Plaintiff rule to enter his Issue the same Term Issue is joyned. Per Magistrum Livesay, & alios Cler. Pasc. 21. Car. 2di. Reg.

The Court doth use upon a motion, to order that good Issues be set upon a Sheriff or other Officer, for not bringing in the body of the party into Court, upon a Writ of *Habeas Corpus* directed unto him, or for not making a good return; but they will not order what sum shall be set upon him, but leave that to be done according to the custom of the Court. *Hill. 21. Car. B. r.* For where things are to go on in a common way of practice, there the Court will not make a special Rule in the Case. Issues are the sums of money wherein he is amerced to the King for not doing his duty in his Office. It seems they are called Issues, by reason they are to be levied out of the Issues and profits of the Sheriffs Lands.

When Issues are set upon a Sheriff or other Officer by the Court, for the neglect of his duty; and afterwards upon some reasons shewed to the Court, why they should be taken off or discharged, the Court doth discharge them: the Roll ought to be marked, to shew they are discharged, otherwise Process may issue out to levy these Issues, notwithstanding they

are discharged by order of Court. *Hill. 22. Car. B.r.*  
*For as the Issues do appear upon the Record, so they can-*  
*not be discharged but upon record.*

If an Issue be not well joyned, it is helped after a verdict, by the Statute of *Jeofailes* ; but if the Issue be an immaterial Issue, and a verdict passeth, this is erroneous and is not helped by the Statute. *Mich. 23. Car. B.r.* But there must be a repleader, to the intent there may be an Issue joyned, upon which a tryal may be had. For the Statute was made to help defective Issues after a Verdict, but not to supply an Issue where there was none.

### Judges.

A Judge of the Kings Bench cannot be made by Writ, but by Patent and Commission ; but he may be discharged by Writ *sub magno Sigillo*. 5. Ed. 4. 137.

*Thorpe* Judge of the Kings Bench, was at the will of the King, for his body, lands, and goods, because he had done a thing contrary to his Oath. 40. Ed. 3.

Judge *Ingham* was in *Misericordia Regis*, for causing a Record to be rased, and making an amendment of a poor man set at 6. s. 8. d. to be but 2. s. 4. 2 R. 3. 9.

The Judges are to have a paper of the Causes which are to be spoken to in Court, sent unto them particularly, at five of the clock in the evening, the day before they are to be spoken to in Court. *Hill. 22. Car. B.r.* That they may have time to consider of the business of that day, and prepare to speak to them.

Justices of Oyer and Terminer, cannot proceed try persons indicted upon Endictments not preferred before

before themselves, but the Justices of the Gaol-delivery may. *Trin. 23. Car. B. r. For the Justices of Gaol-delivery, have a more general Commission for proceeding against and trying of malefactors, than the Commissioners of Oyer and Terminer have.*

The Judges of the Common Law, have no ordinary jurisdiction to examine Witnesses in their Chambers, but by the consent of the parties, and by the Rule of the Court they may do it: and there useth not to be any cross examinations of the party, but the course is, to put the Depositions in writing on both parts, and then the Judge doth examine the parties upon their several Oathes, whether their Depositions be true. *Mich. 23. Car. B. r. Yet by a Rule of Court, there may be cross examinations of the parties on both sides.*

Where there do special and doubtful matters arise upon the reading of a Record, so that the Court is not (for the present) satisfied of the Law; the Attorneys on both sides ought to prepare Books, viz. Copies of the Record for the Judges, at the Clyentsequal charge, that the Judges may upon view of the Record, the better consider of the matters in dispute. *For it is the course for the Attorneys, to make their Clyents for to pay for such Books in all such Cases.* By Rolle Chief Justice.

The Judges of this Court declared, that they would not sit longer in Court, than till one a clock in the afternoon upon the last day of the Term, and so they said the Common Pleas had done. *Trin. 1651. B. S. This was, that the Attorneys might not defer their Clyents businesses to the last of the Term, as too usually some do, to the great toyl of the Court, and the prejudice of their Clyents.*



*Jeofailes.*

Q. If an Issue be joyned upon a collateral point, if there be no place alledged whence the Venue may come, this is aided by the Statute of Jeofailes ; but if the Issue be not joyned upon a collateral point, and there is no place alledged from whence the Venue may come, it is not helped by the Statute. *Mich. 22. Car. B. r. Vid. the Statute.*

*Interrogatory.*

One who is by the rule of the Court to be examined upon Interrogatories, ought to attend the Master of the Office, who is to examin him within four daies after the Interrogatories are put in for him to be examined upon. *Mich. 22. Car. B. r. For the speedier dispatch of Justice, and he is not bound to attend before, that he may have sufficient time to prepare to answer.*

*Intendment and Intentions.*

*quant  
tam* The Law doth not punish any one for the Intention to do ill, if the Intention be not put in execution, except it be in the case of Treason, for their Intentions if they be clearly proved by circumstances, shall be punished equally as if they had been put in execution *Trin. 22. Car. B. r. But this is only in high treason, and is done in terrorem, ut poena ad paucos, metus ad omnes, to deter men from that odious offence, and of so high a nature, being not acted against*

against the person of one sole person, but even against the whole Kingdom, which would suffer by it, were they put in execution.

There shall not be intended to be more than one Parish in a City, although there be many; except the contrary be shewed. *Trin. 24. Car. B. r.* For it is not of the essence or constitution of a City, to consist of more Parishes than one, but there may be a City that hath but one Parish in it, as the City of Rochester in Kent, in which is only the Parish of Saint Nicholas.

If one be bound in an Obligation to J. S. in a certain sum of money, and in the *solvendum* of the Bond, it is not expressed unto whom the money shall be paid, the Law will intend it is to be paid to the Obligee. *P. s. 24. Car. B. r.* Because no other person is particularly named, unto whom the payment should be made; for it shall be intended, the money was to be paid to some body, and there being no person particularized to whom it should be paid, it is but reasonable it should be paid to the Obligee. So it is if there be no time limited for the payment of the money, the Law saith, it ought to be paid presently.

A Court which is pleaded (generally) to be held *secundum consuetudinem*, shall be intended to be held according to the Common Law; but if it be pleaded to be held according to a Custom, whereof the memory of man is not to the contrary, it shall be adjudged to be a Court held by Custom. *Trin. 24. Car. B. r.* For a Custom must be so particularly pleaded, but a general Custom is Common Law.

If the Plaintiff do plead, that the Defendant did become bound unto him *per Obligationem suam*, it shall be intended, that this Obligation was sealed and delivered

delivered unto the Plaintiff. *Mich. 24. Car. B. r. For else he did not become bound unto him by his Obligation, for an Obligation that is not sealed and delivered is no Obligation, nor is the Obligee bound by it, and he need not plead that it was sealed and delivered.*

The Intent of the parties shall not be implied against the direct Rules of the Law. *5. Feb. Hill. 1649. B. r. For an Intent is but to be guessed at, and doth not certainly appear: but the Law is direct and plain, and therefore it shall not be presumed, the parties did mean to do any thing against Law, where their Intent doth not appear by express words; for the Law doth alwaies make charitable constructions of doubtful matters.*

### *Impossibility.*

A thing which is Impossible in the Law, is all one with a thing which is Impossible in nature. *21. Car. B. r. For the Common Law is not contradictory in any thing to the Law of nature, but agrees with it in all things and may be said to be the same in effect with it, and so should all good Lawes be.*

### *Impropriation.*

An Impropriation cannot be made but by the Licence of the King, although the Pope did formerly usurp that authority in this Dominion. *Mich. 1649. B. Sup. And the King may do it as he hath supreme authority in all Ecclesiastical, as well as civil matters, within his dominions. See the Statutes in this case.*

Livery and Seisin.

A Corporation cannot make Livery and Seisin to pass away the Freehold Lands belonging to the Corporation, but they may make a Letter of Attorney to another, under their common Seal, to make Livery and Seisin for the Corporation. *Mich. 23. Car. B. r. For Livery and Seisin must be made by one, and not by a multitude. And a Corporation can do no Acts but under their Common Seal.*

If a Tenant for years of Land, do consent that Livery and Seisin shall be made of the Land let unto him, unto him that hath purchased the reversion of those Lands, and it be made accordingly, this is a good Livery and Seisin to make the reversion pass, although that the Tenant for years do not go off from the Land at the time when the Livery and Seisin was made, but was then in actual possession of it. *Mich. 23. Car. B. r. For his Term is not prejudiced by the Livery: For only the reversion passeth, and his Assent amounts but to an Attornment to him, to whom the Livery is made.*

If a Deed of Feoffment be made of Land, *Habendum à die datus*, and the next day after the date of the Deed, the Feoffee gives Livery and Seisin of this Land, this is a good Livery and Seisin; but if this Livery and Seisin were made by an Attorney, *Nil valet*. *Mich. 23. Car. B. r. A thing that is to take effect, à die datus, is not to take effect until the next day after the Deed bears date.*

A makes a Lease to B. for life, *Habendum à die consensationis*, and Livery is made by A. himself a month after; and it was there held that the Livery was

Aa

good;

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good, it being made by the Feoffer himself, but if it had been executed by Letter of Attorney, then *nil operatur*, by this future Livery. *Smith and Boles case Croo. Jac. 458.*

One may give Authority by Paroll unto another to take Livery and Seisin of Lands for him; and if such Livery and Seisin be taken accordingly, it is good. By Rolle Chief Justice. Mich. 1650. B. S. *For this shews his assent to take the Lands by the Livery and Seisin, and the other is but as a Conduit-pipe to convey the Land unto him from the Feoffer.*

#### *Lease, Lessor and Lessee.*

If one take a Lease by Indenture for years of a ruinous house, or that wanteth Reparations, and do covenant in the Lease to leave the house at the end of the term in good repair, he is bound to do it, and an Action of Covenant doth lie for the Lessor against him, if he do it not, 21. Car. B. r. *But if he has not covenanted expressly to do it, he had not been bound by Law to do it. For the Law binds not the Lessee to leave the thing lett in better condition then it was when it was first lett unto him, except he bind himself by an express Covenant to do it.*

A Lease which is only voidable, and not absolutely void, must be made void by the Lessors re-entry; but if a Lease be absolutely void, there needeth no re-entry. 21. Car. B. r. *That is said voidable which may be made void, if the Lessor will, and may be continued if he please, at his election the Lease is made void by re-entry, and putting out the Lessee, or else it is continued or affirmed by receiving the rent, and thereby acknowledging him still for his Tenant.*

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Where the Freehold of Lands in question, in an Action of Trespass and Ejectment is entire, although the Lands be lett out to several persons for years by several Leases, if he whose title is concerned, and doth intend to try the Title of these Lands, do seal a Lease of Ejectment upon the Lands only that are in the possession of one of the Tenants that holds parcel of these Lands; This is a good Lease, to try the title of all the Lands: But if the Free-hold of the Lands in question, be not an entire Free-hold, such a Lease sealed upon parcel of the Lands in question, is not good to try the title of all the Lands. *Pasc. 23. Car.*

*B. r. For several Free-holds must have several Leases to them: because they are the Right and Titles of several persons, or may be held by several Titles.*

A Lease for years, although it be a very long lease, cannot be entail'd (but may be assigned in part to several uses, which may be an entail in effect) for the nature of a Chattel cannot be turned into an inheritance. *Hill. 23. Car. B. r. Which would be if such a Lease which is but a Chattel, might be entailed: for an estate entail is an Estate of Inheritance; yet in many they do often make good such entails made by will.*

A Lessee for years is not bound to repair the house unto him, which is burned by accident: if there be not a special Covenant in the Lease, that he shall leave the house in good repair at the end of the term: if the house be burned by the negligence of the Lessee, or his Servants, Wife, or Children, he shall repair it, although there be no such Covenant in the Lease to do it. *Pasc. 24. Car. B. r. For by the Lessees Covenant, it shall be intended, that he took notice of all accidents, might happen, and his Covenant shall*



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be taken generally, and without exception, and stronger against himself; for negligence which is prejudicial to another, is punishable in Law.

In a Lease for years by Indenture the term is not certain before the *habendum & tenendum* in the Lease. *Term. Trin. 24. Car. B. r.* For though it do appear before the *habendum & tenendum*, that the Lands in the Lease mentioned are demised unto the Lessee, yet it doth not appear for how many years they are demised, nor when the Lease is to begin, nor when to end, until it is declared in the *habendum*.

One may raise an Estate for life in Lands to another by way of use, (*viz.* by covenanting with A. in consideration of natural love and affection, & but a Covenant in consideration of affection only, for money only is void, and the Estate shall never rise upon it, to stand seized to the use of *J. S.* for as long as he shall live, (*viz.* during the natural life of *J. S.*) without Livery and Seisin. *Mich. 24. Car. B. r.* For the Estate is executed in the *cestuy que use*, by the Statute of Uses of 32. H. 8. without Livery.

If one be in Possession of Lands of another, and hath usually paid a Rent unto him for these Lands, although it cannot be expressly proved, that the Lands were demised at will to him that is thus in possession of the Lands, that is, that he should hold them as long as both parties should please, yet the holding of the Lands shall be interpreted to be by Lease at will. *Mich. 1650. B. S.* For it shall be presumed that he in possession doth hold the Lands, that the owner of the Lands did receive the Rent for those Lands upon some Contract made between the parties, for holding the Lands for some term, and for paying of such a rent for them, and a less time cannot be supposed, then to hold them at will.

If one make a Lease for years, and after the Lessee enters upon the Lands lett, before the term is expired or determined, and doth make a Lease of these Lands to another, this second Lease is a good Lease, until the first Lessee doth re-enter. 2. *M.iii. Pasc.*

1650. B. S. *And then the first Lease is revived, and the first Lessee is again in possession by virtue of the first lease.*

Although a Lessee for years do lose his Indenture or Demise, of the Lands lett unto him, yet he shall not lose his term in the Lands lett by the Indenture, which is so lost, If it can be proved any way, that

there was such a term lett unto him by Indenture, and that it is not determined: so it is of any other Estate in Lands, if the Deed that created the Estate

is lost, if it can be proved, that there was such a Deed made, and that such an Estate was conveyed

by the Deed. *Pasc.* 1650. 14. and 15. *M.iii.* 1650.

B. S. *For the Estate in the Lands is derived from the party that made the Deed, and not from the Deed, otherwise then instrumentally and declaratively, to shew his*

*mind and intent that conveys the Estate, as also the mind and intent of him that receives it, and the losing of the*

*Deed can make no alteration herein.*

*Liberty.*

Matters which do concern the Liberty of any one, ought to be determined as speedily, as lawfully they may be. *Trin.* 22. *Car. B. r.* For liberty is counted

very precious, and exceedingly favoured in Law, not only in respect of the particular profit, which every one obtains by his Liberty, but also in respect of the Weal-

of the publick; For one in Prison is disabled to be useful to himself, or any other; and every good Subject is useful

well to the publick, as to himself.

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Where any thing is shewed to be done within Liberty or a Franchise, there it is not necessary to shew within what County that Liberty or Franchise doth lie. *Trin. 23. Car. B. r. For the Franchise has no relation to the County.*

### *Leet.*

If a Court Leet do not choose a Constable to serve within that Leet, the Quarter-Sessions of that County where that Leet is, may choose one. *Mich. 22. Car. B. For the Common-wealth must not be unserved, and much concerns the Peace of the Common-wealth, but more especially of the County wherein the Leet lies, have such Officers chosen.*

*Q. Whether a Court Leet may enquire of private Assaults and Batteries, if there be no blood-shed in the case? For Bacon Justice, and Walker Apprentice to the Law of the Inner-Temple, held that a Court Leet might enquire of them. But Rolle Justice held to the contrary. Pasc. 24. Car. B. r. Because they are actionable to the Common Law only, by the Parties injured and are not publick offences against the publick.*

### *Limitation.*

If a Limitation of an Estate in Lands be uncertain, such a Limitation is not good in Law, but void. *H. 22. Car. B. r. For the Law cannot tell what condition to make of such a Limitation, by reason of the uncertainty of it, nor how to direct the estate limited, therefore the estate shall remain as if there had been such limitation.*

There is a difference between a condition pre-

ident, annexed to an estate subsequent to this condition, and a Limitation subsequent annexed to an Estate presently vested. *Hill. 22. Car. B. r.* In respect of the uncertainty of the former estate, which depends upon the condition, and the certainty of the latter estate, which hath no dependency upon the limitation.

A thing that is expressly limited in a Will by plain words, shall not be afterwards made incertain, by general words which follow in the said Will. *Hill. 23. Car. B. r.* For that were to encounter a thing that is plain and certainly known, with that which is obscure and doubtful, and to make doubts instead of clearing of them.

A Limitation of an Estate to begin after the determination of an absolute Estate in Fee-simple, is a void Limitation in Law, for if the Law should suffer such a Limitation to be made, this would be to suffer perpetuities to be made, which the Law doth abhor; but yet a Limitation of an Estate to begin after a Fee-simple upon a Contingency, is a good Limitation. *19. April. 1650. B. S.* For such an Estate in Fee may never take effect, and so it is not an absolute Estate in Fee-simple. And so is *Pell and Brown Case* in *Cro. Jacobi*.

*London.*

By the Ancient custom of the City of *London*, there ought to be but four hundred *Carmen* allowed within *London*. *Hill. 23. Car. B. r.* But now that number may be encreased, if there be occasion to have more.

*Latitat.*

In the Case of *Abbot against Camby*, Hill. 1656. B. S. It was said by the Court that a *Latitat* cannot issue out of this Court into the County of Middlesex, for it is against the very supposal of the Writ, but it must be a Bill of Middlesex, which is in the nature of a *Latitat*.

A *Latitat* out of this Court is in the nature of an original Writ, or *Clam fregit*, by which they proceed upon in the Common-Pleas. Mich. 1649, B. S. And is of Antiquity beyond the memory of man.

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*Mareschal.*

**T**He Mareschal of the Mareschalsea of this Court is intended to be always in Court, while the Court is sitting. 21. Car. B. r. For it is his Office to be always attending upon the Court to execute his Office in relation to the Court upon all occasions that may fall out sitting the Court. And he is finable for his absence. Hill. 21. and 22. Car. 2. Regis in B. r.

*Monstrance.*

None shall be compelled to shew a thing in pleading, which by common intendment they cannot have knowledge of. 22. Car. B. r. 38. H. 6. f. 3. For the Law doth not require unreasonable things to be done.

*Motion to the Court.*

*Monday* is a special day for motions in this Court by the ancient course. I suppose it is so, because the Court and Council cannot be so well prepared to speak in solemn matters on that day, in regard of the Lords day which immediately precedes. *Mich. 22. Car. B. r. Yet motions are made upon any day, as the business of the Court of the day will permit.*

One ought not to move the Court for a thing against which they have delivered their opinion. *Trin. 22. Car. B. r. But ought to rest satisfied with the Judgment of the Court, and to submit thereunto.*

If monies be upon a motion ordered to be brought into the Court, and are accordingly brought in, they ought not to be taken out of the Court, but upon a motion, and rule of the Court made therein. *Hill. 22. Car. B. r. For when they are brought into the Court, they are in the custody of the Court, and to be disposed of by their directions only.*

If any thing be moved to the Court upon a Record, if the Record upon which the motion is made be not in Court when the motion is made, the Court will make no Rule upon such a motion. *Hill. 22. Car. B. r. For the Court will be satisfied by the Record, whether the matter of the Record upon which the motion is grounded, be so as is suggested by the Council, and will not rest upon suggestions made at the Bar; For the Court judges not upon allegata only, but upon allegata & probata.*

If there be divers Rules of the Court made in a Cause, and the party intends to move upon these Rules, he must produce the Rule that was last made in



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*in the Cause, and move upon that. Pasc. 23. Car. B. r. Yet it is necessary also to have all the Rules made in the Cause, to satisfy the Court how the Cause stands in Court, and how it hath been proceeded in from time to time, and how the Rules depend upon one another; but the last Rule is the most material.*

One party ought not to surprise another by a motion in Court, but he ought to move in such convenient time, that the other party against whom the motion is made, may have time to be heard, and to make his Defence. *Pasc. 23. Car. B. r. And this the Court will grant.*

It is against the Rule of the practice of this Court to move matters in Law upon the last day of any Term, except it be where the case is peremptory, or of necessity to be moved then. *Pasc. 23. Car. B. r. Because the other Party cannot have time to make his Defence by answering the motion, and that day is also a day appointed chiefly for motions, to prepare businesses against the next Term to come.*

One ought not to move the Court for a Rule for a thing to be done, which may by the common Rules of practice of this Court be done without moving the Court for it, much less ought the Court to be moved for the doing of that which is against the common Rules of the practice of this Court. *24. Car. B. r. For the Court is not to be troubled with, nor the Clyent put to the charge of needless motions, nor of motions not to be granted, and the former sort of such kind of motions do savour of ignorance, and the latter of too much presumption; the former are to put the Court to needless trouble, and the latter are moved against the honour of the Court.*

When a thing questionable between the parties is

to be moved to the Court, for the settling thereof; he that intends to move it, must give the adverse party timely notice of the same (as near as he can) when he will move it. *Mich. 1650. B. S. And upon what he intends to move, that he may be prepared to answer the motion at the time when he moves, for the quicker dispatch of business, and for the saving\* of further charges.*

If a Rule of Court was grounded upon an *Affidavit*, he that will move the Court to make the Rule void, must when he moves produce the *Affidavit* in Court. *Hill. 1649. 22. Feb. B. S. That the Court may be informed upon what grounds the Rule was made, and whether there be cause shewed upon the motion, sufficient to induce them to vacate the Rule.*

It is against the course of practice of the Court for any person to make a motion in his own Cause. *24. Maii. Pasc. 1650. B. S. So said in one Thurston and Masons Case, viz. for a Counsellour to do it; yet of latter times it hath been sometimes suffered to be done.*

When the Court doth grant a thing to one upon a motion, which was in the power of the Court, either to grant, or not to grant it, the party that hath his motion so granted unto him, is by the Rules of the Court to pay 12<sup>d</sup> to the box for it all the Term till the last day thereof, and the last day he is to pay 2<sup>s</sup>. *1650. B. S. Which money is given to the Prisoners of the Kings Bench Prison, as it is said.*

It is not usual to move for a Tryal at the Bar upon the last day of the Term. *2. Julii. 1650. B. S. Nor for the Secondary to make a Report, nor for a Prohibition, nor to vacate a Judgment, or such like cases of dispute, except both parties be in Court, and are contented with the motion, and prepared to speak in it; and if*  
*such*

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*such motions be made, the Court will make no Rule upon them.*

The three last days of the Term, if it be not an **Issuable Term**, are appointed to hear motions only, & not other businesses, except they be peremptory, or upon other special occasions; But if it be not an **Issuable Term**, then the two last days are only for the hearing of motions; for in those Terms there is less occasion for motions than in **Issue Terms**. 30. Jan. 1650. B. S. The **Issue Terms** are **Hillary-Term**, and **Trinity-Term**; and they are so called, because though there be **Issues** joyned in every Term, yet not so many by much, as in these Terms, in regard of the Causes which are to be tryed (all England over) at the **Affizes**, which do follow in the next Vacations after the said Terms, viz. the **Lent-Affizes**, and the **Summer-Affizes**, as they are commonly called.

### *Motion.*

In the Case of one **Topleys** vers. **Rag. Hill**. 1657. It was said that one ought not to move for several things in one motion, and therefore upon a motion that one is an **Ejectment** might be made party to defend his Title, and that he might also imparl to the next Term, the party was admitted to be made a party, and ordered to move again at another time for an **imparlance**.

By **Glyn** Chief Justice, it is not the custom of the practice of the **Common Pleas** for a **Serjeant at Law**, to move for a **Clark** of the Court, and afterwards for his **Clyent**. Mich. 1655. B. S. For it seems it is not intended there, that he doth move without a Fee for a **Clark** of the Court, and therefore if he should be so heard, he would have a double motion at one time, which no Court doth allow; but in this Court it is usually done,

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done, so that it seems the Council here are more civil to the Clerks of the Court, then they are in the Common Pleas.

### *Man-slaughter.*

A Grand Jury may find a Bill of Man-slaughter to be *Billa vera per infortunium*. Pasc. 23. Car. B. r. Q.

### *Mortgage.*

If Lands be Mortgaged to one, the interest in Law in these Lands is in the Mortgagee before the forfeiture of them. Mich. 23. Car. B. r. For he hath purchased the Lands upon a valuable consideration, as the Law will intend, and though the Mortgagee may redeem them, in respect of the agreement betwixt the parties, yet it is not known, whether he will do it, or no; for it is in his power to do it, or not to do it, and if he do it not, then the estate is absolute in the Mortgagee without any other act to be done to pass the Estate.

### *Messuage.*

One Messuage cannot be appurtenant unto another Messuage. Pasc. 24. Car. B. r. For a Messuage is an entire thing of it self, and therefore cannot be appurtenant to another thing; for that which appertains to another thing, may be said to be part of it, and so not entire of it self.

### *Non-sute.*

*Non-sute.*

**U**Pon a Tryal, when the Jury comes in to deliver in their Verdict, and the Plaintiff is called to hear the Verdict; If he do not appear after he is thrice called by the Cryer of the Court, he is to be Non-sute, and the Non-sute is to be recorded by the Secondary, by the direction of the Court, at the prayer of the defendants Council. *Hill. 21. Car. B. r. For the Court will not order it to be recorded, except the Council pray it for the Clyent.*

When a Plaintiff is Non-sute, if he will again proceed in the same Cause, he must put in a new Declaration, and cannot proceed upon that Declaration, whereupon he did proceed in the Cause, and wherein he became Non-sute. *22. Car. B. r. 16. Ap. 1650. B. S. For by his being Non-sute, it shall be intended that he had no cause of Sute as he declared in, and so that declaration is void, and he hath no day in Court.*

The King of Spain hath been Non-suit in England. *Mich. 22. Car. B. r. And this stands with reason, for if a foreign Prince will take the benefit of the national Laws here, he must proceed and stand to the Rules and orders of the Court wherein he prefers his Action.*

If the Plaintiff will not proceed upon his Declaration, as he ought to do by the Rules of the Court, the Defendant may Non-suit him. *Mich. 1649. B. S. Q.*

Although upon a Tryal the Plaintiff be called to hear the Verdict, and do not appear to hear the Verdict when he is called, and thereupon the Court direct the Secondary to record the Non-suit; yet if afterwards the Plaintiff do appear, before the Non-suit be actually recorded, the Court may proceed to take the

the Verdict. *Trin. 1651. B. S.* For it is not a Non-suit until it be recorded by the Secondary, and then it is made part of the record, and is in the nature of a Judgment against the Plaintiff.

If the Plaintiff be not ready at the Tryal with his Record when the Jury is called, the Court may call him Non-suit. By Rolle Chief Justice. *1651. B. S.* For it shall be intended, he will not proceed in his cause any further, yet sometimes the Court hath stayed a while in expectancy of his putting in his Record.

*Nolle Prosequi.*

*Upon part of a Record.*

A *Nolle Prosequi* is, where there are divers Issues, or an Issue and Demurrer in one cause joyned between the Plaintiff and the Defendant, and the Plaintiff enters upon the Roll, a *Nolle Prosequi*; That is to say, that he will not proceed upon one or more of the Issues or Demurrer joyned, yet he may notwithstanding such Entries, proceed to Tryal upon the rest of the Issues. *Hill. 23. Car. B. r.* Or to argue the Demurrer.

*Nusance.*

A Nusance made in a Port or Haven by the sinking of a Ship there, ought to be removed by the owner of the Ship, and if he do it not, he may be indicted for it, as for making a common Nusance. *21. Car. B. r.* For it is prejudicial to the Common-wealth in hindring of Navigation and Trade.

An Action upon the Case ought to be brought against one that makes a private Nusance, and he ought not to be indicted for it. *Pasc. 23. Car. B. r.* For *En- dictments* ought to be in the Kings name, and do pre-  
sume



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*sume to be preferred for offences done against the publick, and not for private injuries.*

A common Nuisance may be abated or removed by those persons who are prejudiced by it. *Pasc. 23. Car. B. r. And they are not compellable to bring actions to remove them.*

### *Nomine Pœnæ.*

A *Nomine Pœnæ* for the non-payment of a Rent, ought to be legally demanded, if the Rent be behind, as well as the Rent is to be demanded before the grantee of the Rent can distrain for it. *21. Car. B. r. For the Nomine Pœnæ is of the same nature as the Rent is, and is issuing out of the Land, out of which the Rent doth Issue and savour of the realty.*

### *Notice.*

The Plaintiff and Defendant are both bound at their peril, to take notice of the general Rules of practice of this Court ; but if there be a special particular Rule of Court made for the Plaintiff, or for the Defendant, he for whom the Rule is made, ought to give Notice of this Rule unto the other ; or else he is not bound generally to take notice of it, nor shall be in contempt of the Court, although he do not obey it. *Pasc. 24. Car. B. r. Mich. 1649. B. S. For general rules are the general practice of the Court, whereof every one must take Notice of that hath to do there ; but particular rules are made upon particular and extraordinary matter, happening in the proceedings upon the motion of one of the parties made to the Court, of which the other may be ignorant, and therefore is to have notice of them given unto him.*

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The Court is bound *Ex Officio* to take Notice of all matters which do appear upon the Record depending before them; but of matters *Dehors*, viz. to search the Almanack for days, and to compute times mentioned in the Record, they are not bound *Ex Officio* to do it. 21. *Car. B. r.* 24. *Car. B. r.* Q. Tamen.

The Court is not bound to take Notice of the new stile, but of the old English stile. 21. *Car. B. r.* For the old is that whereby all accounts in the Common Law are guided, and not by the new which is Foreign, and comes ten days before the English stile or account; the old stile is called the Julian Account, and the new stile is called the Gregorian; the former was made in the time of Julius Cæsar the Emperour, the latter in the time of Pope Gregory the 13.

The Plaintiff ought to give the Defendant eight days Notice *exclusive*, before he executes his Writ of Enquiry of Damages, so it is upon a *Nisi prius* Tryal in London or Middlesex, or else the Court will quash it, although he have executed it, and put him to a new Writ of Enquiry, or a new Tryal upon payment of the Defendants costs, upon the motion of the Defendant made to the Court of his want of such Notice, and proof thereof by Affidavit. *Trin. 22. Car. r. and Pasc. 1652. B. r.* *Exclusive* is meant, that the day upon which the Notice is given, is not to be one of the eight days, but the Writ is to be executed upon the ninth day; and so long Notice is to be given that the Defendant may have time sufficient to defend himself by his Council, and Witnesses, upon the evidence given against him before the Sheriff and the Jury, by the Plaintiff.

The Common Law doth not take Notice of the intentions of the party to do any unlawful Act, except

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it be in case of high Treason. *Trin. 22. Car. B. r.* For mans Law is to regulate the words and Actions of men, and not the thoughts, of which it cannot have concurrence: But Gods Law extends to the thoughts, and tends to the regulation of them also.

This Court is to take Notice of a general Statute viz. such a one as concerns the publick; for that is for the time in the nature of a Law, but not of a particular Statute, which concerns some particular persons only in their private interests. *Mich. 24. Car. B. r.* Except such particular Statute do appear before them by pleading or otherwise; for then it becomes matter of Record.

If a Declaration be put into the Office, although it be not filed, yet is the Defendants Attorney bound to take notice of it. *Mich. 22. Car. B. r.* For it is the Duty of the Plaintiffs Attorney, only to put the Declaration into the Office, and the Officer in the Office is to file it, and though it be not filed, yet may the Defendants Attorney take a Copy of it.

None is bound by the Law to give Notice to another of that which that other person may otherwise inform himself of. *Mich. 22. Car. B. r.* Except he testifies himself by special covenant and agreement to do it; for the Law will not put an unnecessary trouble upon a man without his own consent.

If one do commence an Action in this Court against another, and join Issue, & yet doth not proceed to a tryal in his action, by the space of a whole year next after he began his Suit, he ought afterwards by the Rules of the Court, to give the Defendant a whole Terms Notice that he will try his cause, before he proceed to a tryal therein. *Mich. 22. Car. B. r.* For his delay might give occasion to the Defendant to call in

that he intended to let his Action fall, and so to neglect to make provision for his Defence at the Tryal; and therefore it is but reason that he should have more than ordinary Notice in an extraordinary case.

If Notice of Tryal be given in London or Middlesex, and not tryed that sitting, the Plaintiff may try it the next sitting upon two days Notice, but if not tryed at the next sitting, then new Notice is to be given as at the first, viz. Eight days. Per Magistrum Livesey, & al. &c. P. 21. Car. 2. Regis.

If a cause hath continued four Terms without prosecution before Issue joyned, the Defendant is to have a Terms Notice to plead, &c. before Judgment can be entred by default; if after Issue joyned, a Terms Notice of Tryal. Per Magistrum Livesey, & al. &c. P. 21. Car. 2. Regis.

If Notice for a Tryal be given to the Defendant himself, or to his Attorney, this is a good Notice; but if Notice be given thereof to the Council of the Defendant, it is not a good Notice. Hill. 22. Car. 2. For Council are not bound to take Notice of such warning for a Tryal, nor to give the Clyent Notice thereof; And it may be though one have been formerly of Council with the Defendant in other business, or in the cause to be tryed, yet he may not be of Council at the Tryal; nor is it the part of a Councellour to sollicite his clients business, but to give Notice is to sollicite.

The Plaintiff and Defendant are both bound to take Notice of such Rules of the Court as do concern the proceedings of their Cause, at their own perils.

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*Hill. 22. Car. B. r.* For if they know them not, yet they may inform themselves by their Councel and Attornies. But this is only to be understood of the general Rules, and not of particular rules made upon the motion of either party, for of such rules there ought to be Notice given to the party concerned by the other. *Pasc. 24. Car. B. r.* For whose advantage the Rule is made.

When Councel are to argue a matter in Law in Court, the Judges ought to have Notice thereof given unto them before the day, except it be where the Court have appointed a set day for it, or if there be not such Notice given, then the cause is to be put in the paper of causes, that it may come on in course to be spoken unto. *Pasc. 23. Car. B. r.* And by putting it in the paper, the Judges have Notice, for they have a paper of the causes to be spoken to in matter of Law the day before they be spoken to by the Officer of the Court.

The Officers in Court ought to take Notice of the proceedings of the causes depending in Court. *Pasc. 23. Car. B. r.* For, for that cause do they sit in Court.

If the Plaintiff or his Attorney do give Notice unto the Solicitor of the Defendant, that he intends to try his cause at such a time, this is a good Notice of the Tryal, although it be not given unto the Defendant nor his Attorney. *Pasc. 23. Car. B. r.* For it is the duty of the Solicitor to inform his Clyent of it, and if he do it not, it shall be accounted the folly of the Clyent, to entertain a Solicitor that is so careless in his business, and in this case there is no default in the Plaintiff.

The Defendant ought to have eight days Notice

of the Tryal of the Plaintiffs cause before it be tryed if he live twenty or thirty miles off from the place where the cause is to be tryed; but if he lives forty miles off or above, he ought to have fourteen days Notice before the Tryal. *Trin. 23. Car. B. r.* That the Defendant may have convenient time for his journey, and to prepare his Councel and Witnesses for his Tryal; and if due Notice be not given, the Court upon motion will grant a new Tryal, because he was surpris'd in the Tryal for want of due Notice.

The Plaintiff may if he please give the Defendant Notice when he intends to try his cause the same day that he hath joined Issue with the Defendant in the cause to be tryed betwixt them. *Trin. 23. Car. B. r.* But this is not usually done, but deferred till the usual time of Notice enjoyned by the Court.

If one be bound by the Rule of the Court, to give unto another personal Notice of a thing, it is not sufficient that Notice be left at the dwelling house of the party. *Mich. 23. Car. B. r.* For personal Notice is Notice given to the person of the party himself, and not to another, or at the dwelling house of the party; for Notice may be given there, and yet the party may not know it; and usually where personal Notice is to be given for the party to do a thing, it is very penal to him if he do it not.

It is not necessary for the Plaintiff to give new Notice of the tryal of his cause where a retraxit is entered; for this is but a forbearance to try his cause huc illuc, and he may afterwards proceed notwithstanding the retraxit was entered for that time. *Mich. 23. Car. B. r.* The entering of a retraxit is when the Plaintiff after he hath entred his cause to be tryed, and hath put in his record, doth make an entry in the Judges book, that he



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*hath withdrawn his Record, and intends not then to proceed to his tryal ; the word comes of the word retrace, here, to withdraw or draw back.*

It is sufficient upon an Action of Trespass and Ejectment brought to try the title of Land, if the Tenant in possession of the Land, have Notice of the Lease of Ejectment, although he be but an under Tenant of the Land, and although no Notice thereof is given to the upper Tenant or to the owner of the Land whose title is concerned. *Hill. 23. Car. B. r. & Pasf. 24. Car. B. r.* For the possession of the Land is only recoverable in this Action, and that doth chiefly concern the Tenant in possession of it ; and it is be properly in Law that is to defend the Title.

A Clerk of Commissioners of Sewers is such a Clerk as the Law takes Notice of. *Hill. 23. Car. B. r.* For he is an Officer appointed by Act of Parliament. *Q. Vid. the Statute.*

If the Panel of the Jury Impanelled to try a cause, be returned, and be afterward altered or changed before the tryal, the other party ought to have Notice of it, otherwise it is a surprizal of the party. *Pasf. 24. Car. B. r.* For he may not by that means be prepared for his challenges, nor to prove them.

If the Plaintiff give Notice to the Defendant for a Tryal, and there is no Jury returned to try the cause so that the cause cannot be tryed at the day appointed, if the Plaintiff will afterwards try his cause, he must give the Defendant new Notice of this Tryal. *Pasf. 24. Car. B. r.* Else the Defendant cannot be able to know against what time he must attend to make his defence ; and there was no default in him that the Jury did not appear.

If the Plaintiff give but eight days Notice of a try

unto the Defendant, where by the rules of the Court he ought to have given him fourteen days Notice thereof, yet he may enlarge the eight days unto fourteen days after the Notice of eight days given. By *Hodsdon* Secondary. *Trin. 24. Car. B. r.* For it is all one as if he had at the first fourteen days Notice, so the enlargement be given Notice of in convenient time.

By the course of the Court, the Defendant ought to have convenient Notice of the executing of a Writ of Enquiry of Damages, before it be executed, as well upon a judgment given upon a Demurrer as upon a Verdict. *Trin. 24. Car. B. r.* That he may prepare to give evidence to the Jury that are to inquire of the Damages, for the mitigation of them.

This Court is not bound to take notice of Orders made, and of things which are done at the Assizes, although it be by a Judge of this Court, because he acts not here as a Judge of this Court. *Mich. 24. Car. B. r.* For the Justices of Assize, &c. do Act by special Commissions, and not as Judges of the Common Law of any of the Courts at Westminster; but the manner is upon an Order made at the Assizes, to get it drawn up by the Clerk of the Assizes, and to move the Court the next Term to have it made a rule of Court, and then both parties shall be bound by it.

When either the Plaintiff or Defendant doth intend to move the Court in any matter which may prove disputable, the party that thus intends to move, ought to give notice to the other party, that he doth intend to move the Court in it, and to express for what he will move, and when. *Mich. 1650. B. S.* That he against whom the motion is to be made, may not be surprized, but may have time to provide, and may attend the Court to defend himself and answer the motion,

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*which the Court will give him time to do, so that if such notice be not given him, the motion will be to no purpose as to the deciding of the difference in question.*

If the Plaintiff doth tell the Defendant that he will try his cause the first sitting in the next Term, this is a good Notice given of the Tryal, although he do not expressly say upon what day of the month or week it is. *Mich. 1649. B. S. For the Defendant may inform himself of the precise day when that sitting will be, although the Plaintiff do not express it, and it may be he did not know it himself when he gave the Notice.*

In the Common Pleas in an Action of Trespass and Ejectment, if there be not Notice given to the Tenant in possession of the Land in question, who is the Ejector in the Action, they will not suffer the Plaintiff to proceed to a Tryal upon such a Lease. *Mich. 1649. B. S. This I conceive is for the better recovering of Costs, in case the Plaintiff be Non-suit, and it is but reasonable it should be so.*

If the Plaintiff do give unto the Defendant notice for a Tryal, before Issue is joyned in the Cause, this is no good notice. *Hill. 1649. 5. Feb. B. S. For before Issue joyned, there is nothing to be tryed, and so this is a vain Notice, and to no purpose, and it may be there will never be any Issue or Tryal, and so the party, if he should attend upon such Notice, might lose his pains and costs.*

If the Plaintiff carry down his Cause to be Tryed at the Assizes, and it be not then Tryed for want of time, and doth bring it down again at the next Assizes to Try it, he is not bound to give the Defendant new Notice of this Tryal; but if he do not bring it down

down to be Tryed at the next Assizes, and yet will try it at another Assizes after that, he must give the Defendant new Notice before he Try it. *Pasc. 1650. Pasc. 1656. Between Askue and Landye. 6. Miii. B. S.* For the Defendant may doubt whether he will try it or no, having desisted so long from Trying it, and so might be surprized, if he should not have new Notice of the Tryal, or else be put to needless trouble and charge in attending, in case he should not try it; but to avoid trouble, I would advise all persons to give new Notice, if it may conveniently be done.

The party that intends to move the Court in a questionable matter, ought to give Notice thereof to the party against whom he intends to move, or to his Attorney or Sollicitor, and not to his Counsel, for such Notice is not good. *3. Julii. 1650. B. S.* For the Counsel is not concerned to take Notice of any thing, but from his Clyent, nor bound to seek out his Clyent to give him Notice.

It is a sufficient Notice for the Plaintiffs Attorney to tell the Defendants Attorney that he hath put in a Declaration into the Office against his Clyent, and he is not bound to give him a Copy of it. *13. Nov. 1650. B. S.* For there he may take a Copy of it, but usually they do deliver Copies to one another of the Declarations and Pleadings in their Clyents Causes, and it is very rarely omitted, so that now the Attornies do expect it.

If the Assizes that are to be held for that County where an Issue is to be Tryed do fall out to be fourteen days after the end of that Term, wherein the Issue was joyned, It is not necessary to give fourteen days Notice before the Tryal that the Plaintiff will try his Cause at that Assizes, although the Defendant do

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do dwell above forty miles from the place where the Assizes are to be held. 22. April. 1650. B. S. For the Defendant knows the Tryal by the usual course, is to be at that Assizes, and must attend there at his peril, whether the Plaintiff will try his cause or no.

If one be bound by an *Assumpsit* generally to do a thing to another, he to whom the promise is made must give him notice when he will have him to do it, because it is in his election when he will have it done; but if he promise that another person shall do it to him, there he to whom the thing is to be done, is not bound to give notice to that other person when he will have it done. 13. Maii. 1651. Pasc. B. r. For it may be he may not know that other person, and there is no privity of Contract between them two, as there is betwixt the other two.

After a *ne recipiatur* is entred into the Judges Book, so that the cause cannot be Tried at that time, if the Plaintiff will try his Cause afterwards at another time, according to fair practice, he ought to give the Defendant new notice before his Tryal; but in strictness of practice, he is not bound to give new notice of it, for the first notice is to serve for all that Term, and a *ne recipiatur* serves only to hinder the Tryal for that day, whereon it was set down in the Judges Book to be Tried, and it may be the Plaintiff would have Tried it at that day, had not the *ne recipiatur* been entred to hinder him. Trin. 1651. B. S. This is to be understood of Causes that are to be Tried by the Judges every Term, and some days after the Term in London and Middlesex, and not of Causes to be Tried at the Assizes.

One is not bound to give notice to another of a Rule of Court made against him, except part of the Rule



Rule be, that notice shall be given unto him of the Rule. *Trin. 1651. B. S.* For it ~~is~~ intended that his Attorney or Solliciter was in Court when it was made, and that he did take notice of it from them, or else that there needs no notice in the Case, because that the party ought to have done that which he was ordered to do, without the Rule made in the Case. Q.

If a Cause be ready for Tryal, and notice is thereupon given of the Tryal, and afterwards the Cause is put to a reference, and doth depend two or three Terms under reference, but cannot be determined by the Arbitrators, if the Plaintiff intends to proceed to a Tryal, there he must give the Defendant new notice; but if such Tryal be to be the next Term after the reference, it is not necessary to give new Notice of it, for the Defendant may try it by Proviso if the Plaintiff do it not. *Trin. 1652. B. S.*

If one give Notice of a Tryal to the Defendant, and yet doth not try his Cause at the day appointed, but do defer his Tryal for longer time then one Term after, If after that he will try it, he must give a whole Terms notice before his Tryal; but if he try it the next Term after, there needs no new notice; For if the Plaintiff try it not, then the Defendant may try it by proviso. *Trin. 1652. B. S.*

If an Action be laid in *London*, and the Defendant do live fifty miles off, the Plaintiff by the Rules of the Court ought to give the Defendant fourteen days notice of the Tryal before he proceed to it. By Rolle Chief Justice. For in regard of the distance of place, it is fit he should have time for his travel and witnesses, and to prepare for his Defence.

If the Defendant will try the Cause by proviso, he ought to give the Plaintiff due notice that he will try



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try it, and may not take advantage of the Notice formerly given by the Plaintiff. 1654. B. S. *Because it lies in the Election of the Defendant, either to try the Cause by Proviso, or not to try it : And the Plaintiff cannot presume he will try it, being Defendant in the Action, except the Defendant give him Notice that he will try it.*

If one give Notice to another, that he will move the Court in one thing, and tell him in what; and at the time he moves the Court in another matter, and not in that whereof he gave Notice that he would move the Court in, This is not good Notice of the motion, but the Court will give the party further time to answer the motion. By Rolle Chief Justice. *For by such deceitful Notice the party concerned cannot prepare to answer the motion, and such Notice is accounted no Notice.*

Notice given to the party concerned by the Council in the Cause, that he intends to move the Court against him at such a time, is not to be taken by the Court for good Notice, upon the bare averment of the Council at the Bar, that he gave such Notice; but if the Council will make *Affidavit* in writing, that he gave such Notice, the Court will allow it, for then he speaks as a Witness in the Cause, and not as a Councillour,

This Court is not bound *ex officio* to take Notice of private Orders made at the Council Table. By Rolle Chief Justice. *For they are matters but of particular concernment, and not matters of Law or publick businesses, whereof as Judges, they are to take Notice.*

*Notice.*

In the Case of *King and King. Pasc. 1659.* By the Court held, that if the Plaintiff do give wrong Notice of a Tryal, and after that gives a right Notice, but not timely enough, according to the Rules of the Court, this is no good Notice, for the first Notice is not taken for any Notice.

Notice given in the night of a Robbery by the party robbed, with an intent that Hue and Cry should be made after the Felons, is good Notice according to the Statute, if it be given in convenient time after the robbery was done. By Rolle Chief Justice. For it may be it could not be given sooner.

It is not necessary to give Notice of a Robbery to the Vill that is next within the Hundred, where the robbery was done, and unto that place where it was done: For if the next Vill be out of the Hundred, yet Notice given there is good Notice, according to the Statute of *Winchester.* Vid. *The Statute.*

*Non Omittas.*

If the Bailiff of a Liberty do not return a Warrant (made upon a Latitat out of this Court, to Arrest one within the Liberty) directed unto him, the party that is prejudiced by his not making a return of it, may by the course of this Court have a Writ called a *Non omittas* directed to the Sheriff of the County, in which the Liberty lies, commanding him to enter into the Liberty, and to make Execution of the Writ, viz. the Latitat. 21. Car. B. r. For Liberties

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*berties must not be priviledged to hinder or delay the general Execution of Justice ; and if they or their Ministers do neglect their duties herein, this Court, as the Supreme Court, may intermeddle, notwithstanding their priviledges, to put the process of this Court in Execution, that the Law may receive no obstruction by them.*

### Negative preignant.

A Negative preignant is, when two matters are put in Issue in one Plea. *Hill. 23. Car. R. r. And this makes the Plea to be naught, because the Plaintiff cannot tell in which of these matters to joyn Issue with the Defendant, for the incertainty upon which of the matters the Plaintiff doth insist upon ; and so it is not safe for the Plaintiff to proceed upon it.*

### Oath.

Officers of Justice are by the Common Law bound to take an Oath for their due Execution of Justice, and if they refuse to take such an Oath, they may be imprisoned for refusing to take it. *Trin. 22. Car. B. r. So careful is the Law to have Justice done to all parties. Q. What Officers.*

One that is to testifie on the behalf of the King upon an Arraignment of a Felon, cannot be examined upon his Oath for the Prisoner against the King, but he may be examined without giving him his Oath. *Q. Rationem inde,* It seems it is because he hath taken his Oath already to testifie his whole knowledge concerning the matter in question, and so a second

cond Oath is needless. *Mich. 22. Car. B. r.* He is suffered to give his testimony for the Prisoner against the King, without his Oath in favour of life.

By Glyn Chief Justice. *Trin. 1656. B. S.* If Oath be made against Oath in a Cause depending in Court, this is a non liquet to the Court; which Oath is true, and there the Court will take that Oath to be true, which is to affirm a Verdict, Judgment, or other Act of the Court, and not that which is made to destroy them; for this tends more to the honour of the Court and to the expediting of Justice.

The Court will rather believe the Oath of the Plaintiff, than the Oath of the Defendant, if there be Oath against Oath; because it is supposed that the Plaintiff hath wrong done him, and that the Defendant is the wrong doer, and may therefore be rather supposed to swear falsely to protect himself from the Justice of the Law, than the Plaintiff that is forced to flie to the Law to obtain his right. *Pasc. 23. Car. B. r.*

One that is to be a Witness in a Cause, may have two Oaths given him, one to speak the truth to such things as the Court shall ask him concerning himself, or other things which are not evidence in the Cause, and the other to give testimony in the Cause, in which he is produced as a Witness. The former is called an Oath upon a *Voyre dire*, to speak the truth. *Pasc. 23. Car. B. r.*

### *Obligation.*

One ought not to be admitted to be a Witness to prove an Obligation or other Deed, which he takes in the name of another. *21. Car. B. r.* For if he  
*might*

*might be so admitted, this would be upon the matter to suffer him to be a Witness to prove a Bond or Deed made to himself, which is not reasonable ; for every man is supposed to be partial to himself.*

If a Sheriff take a Bond of the Defendant for his appearance to the Action, upon which he is arrested by him at the Plaintiffs sute, and the Defendant doth not appear accordingly, and according to the Condition of the Bond, the Plaintiff may by the leave of the Sheriff sue this Bond in the Sheriffs name, and proceed to Judgment upon it against the Defendant ; but without his leave it cannot be done, but it is at the Election of the Plaintiff to sue this Bond or not, for he may proceed if he please by amercements upon the Sheriff, until he make a return of the Writ directed unto him. *Hill. 22. Car. B. r. For the Bond is only to save the Sheriff harmless against what may befall him, if the Defendant do not appear, and doth no way concern the Plaintiff, but by agreement made afterwards betwixt the Plaintiff and him, of which the Court doth not take notice, except they be moved in it.*

An Obligation cannot be delivered as an escrow unto the Obligee himself, but it may be delivered to another to the use of the Obligee, as an escrow. *Trin. 24. Car. B. r. For the very delivery of it to the Obligee himself, and his receiving it makes it work as a Deed in the very instant of the delivery of it, according to the effect of the Deed ; but being delivered to another to the use of the Obligee, it cannot operate so, because he is no party to the Deed, nor can take any thing by it, and doth but only take it, as an escrow, and as an instrument to deliver it to the Obligee at such time, and in such manner as the Obligor shall direct,*  
and

and if he deliver it otherwise, the Obligor may plead non est factum, if he be sued upon it by the Obligees for the Deed shall not be construed to work otherwise than he whose Deed it was did intend it should.

If one be bound unto J. S. in an Obligation of Twenty pound to be paid unto J. D. this Obligation is not good. *In. 24. Car. B. r.* For to J. S. it cannot be good, for the Obligor is not bound to pay him the twenty pound in which he is bound, for the solvendum is to J. D. and to J. D. it cannot be good, for if he pay him not the twenty pound, he cannot sue for it: For the Obligor is not bound unto him by the Obligation, and the Obligation is void to all intents; and where a Deed can have no Operation in Law, it is utterly void, and it is as if no such Deed had been made. *Sec. Q.*

If money be not paid according to the Condition of an Obligation, the Obligation doth thereby become a single Obligation; that is, it shall be taken as an Obligation without a Condition; for the benefit of the Condition, which the Obligor might have taken advantage of by the payment of the money according to the Condition, is lost by the not paying of it, and so it is destroyed, and the Obligation rests in force, as if it had no Condition annexed to it. *Mich. 24. Car. B. r.*

An Obligation is a good Obligation, although it do want a date. *Hill. 1649. B. S. 8. Feb.* For the date is not of the Essence of the Deed, but the sealing and delivery of it: For if the sealing and delivery of it be proved, although the time precisely of the doing it cannot be proved, yet it is a good Deed; yet the date of a Deed may be very material in some Cases.



*Orders.*

This Court may quash any Orders made at any publick or private Sessions of the Peace, or made by any other Commissioners, if they see good cause for it. *Mich. 22. Car. B. r.* For this Court is the superintendent Court over all other Courts, and is to regulate their proceedings, where they be irregular and illegal.

If a Cause be put in the paper of Causes, that it may be spoken unto in matter of Law by the Order of the Court, and the Attorney in the Cause doth not attend the Cause at the day, the Cause is to be put out of the paper, and not to be put in again that Term. *Mich. 22. Car. B. r.* Except very good cause be shewed to the contrary.

This Court doth not take notice of Orders made in Chancery. *Trin. 23. Car. B. r.* Nor in any other Court, as to be bound by them, but will proceed according to the Rules and Orders of this Court ; and if they should do otherwise, their proceeding would be thereby much interrupted to the prejudice of the people.

By the Orders of this Court (the three last days of the Term) the Judges have no paper of Causes, either of Records or Conciliums delivered unto them, for those three days are to hear motions. *Trin. 23. Car. B. r.* That is, the three last days of Hillary Term, and Trinity Term, which are Issue Terms : for the two last days only of Michaelmas Term, and of Easter Term which are not Issue Terms, are for motions.

Tuesdays, Thursdays, and Saturdays are the proper days by the Orders of this Court, to hear matters of Law. *Mich. 1649. B. S.* But chiefly Saturday

*the other three days are proper for motions and other businesses; but this doth not always hold.*

*Outlawry.*

The Court will not reverse an Outlawry, although both the parties consent to it, *viz.* the party Outlawed, and the party at whose sute he is Outlawed, except there be error assigned in the Outlawry. *Mich. 22. Car. B. r.* For matters of Record are not to be destroyed without sufficient cause, and the Outlawry also doth concern the King as well as the Parties, and therefore not to be overthrown without cause.

An Outlawry which is grounded upon an Endictment grounded upon the Statute against forcible entries, preferred against divers persons, may be reversed as to some of the parties endicted, and yet may stand good, as to others that are Outlawed upon the same indictment. *Hill. 22. Car. B. r.* For the Outlawries against them are several and not entire, and the proceedings to the Outlawry may be good as to the Outlawing of some of them, and the proceedings to the Outlawry as to others, may not be good.

An Outlawry that doth not express that the party Outlawed was proclaimed, as he ought to be, is not good, but may be reversed. *Trin. 23. Car. B. r.* Because it is defective in matter of substance.

If the Defendant do not appear upon the *quinto* *exco* made by the Sheriff of the County at his County-Court, in the County where the Defendant doth dwell, then he is outlawed by the Coroner. *Pasc. 50. 22. Maii. B. S.* For the Coroner is the chief officer in criminal matters in the County.

*Office and Officer.*

The chief Cryer of this Court hath his Office by Patent from the King ; and this Office may be granted in reversion. *Pasc. 23. Car. B. r.* For this Court is the Kings own proper Court, where himself used to sit in person, and it is for his honour to have such Officers by Patent, who are upon the matter to attend his own Person, and not to leave such places to be disposed of ad placitum, and it may be granted in reversion, because it is but a ministerial place.

The Office of Assurance cannot assure the life of one that hath an Office for his life, as it may do the life of one that is at Sea, or beyond Seas, and employed in Merchants affairs. *Mich. 1649. B. S.* For they have no power to assure the life of any, but in case of Merchants affairs, by the Statute which gave them their power, which is the Statute of 43. Eliz.

*Oyer of a Deed, &c.*

If one be sued upon an Obligation, he may pray Oyer of the Obligation, and before he hath Oyer of it, he is not bound to plead to the Plaintiffs Declaration ; yet he may plead without Oyer of it, if he please for he may take upon him to remember it without hearing it : But if he do plead without Oyer of it, he cannot after his pleading wave his Plea, and demand Oyer of it. *18. April. 1650. B. r.* To demand Oyer of the Obligation, is not only for the Defendants Attorney to desire the Plaintiffs Attorney to read the Obligation unto him, as the word Oyer seems only to import to have a sight of it, but that he may have a Copy

is, that his Clyent may consider by it what to plead to the Action.

*Paper Book.*

If all special Pleadings where the Plaintiff takes Issue upon the Defendants Pleadings, or Cravereth the same, or demurreth so as the Defendant is not thereby let in to alledge any new matter, there he may make up the Paper Book without giving a Rule with the Secondary to rejoin, &c. and if the Defendant doth not in four days after the Paper Book delivered, provided the same be delivered in time, bring back the Paper Book, and join Issue or Demur, or give a general Issue, Judgment may be entred by default. Per Magistrum Livesey, & al. &c. P. 21. Car. 2. Regis.

*Pleas and Pleadings.*

If an Action be grounded upon a Statute, there the Statute must be precisely set forth: but if a Statute recited be but an inducement to the action, there it is not necessary to recite the Statute precisely. *Hill. 21. Car. B. r.* For if the Statute be not precisely recited, where the Action is grounded upon the Statute, the Defendant cannot tell how to plead to the Statute; but if the Statute be alledged but by way of inducement, the pleading hath no dependance upon the Statute, and therefore there needs no such precise recital.

As a Plea in bar may go *per partes*, so may in like manner a Plea pleaded in abatement of a Writ. *Hill. 21. Car. B. r.* A Plea is then said to go *per partes*, as

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*I conceive, when one part of it goes to one part of the Declaration, and another part of the Plea answers another part of the Declaration ; for a Writ may be naught in several parts of it, as well as a Declaration may be.*

One that appears in Court upon a *Habeas Corpus*, ought to plead the same Term wherein he comes in. *Hill. 21. Car. B. r.* In regard of the delay and extraordinary charge the Plaintiff hath been put unto by so bringing him in.

If the Defendant doth not plead according to the Rules of the Court, so that the Plaintiff may enter Judgment upon a *Nihil dicit*, yet if after the Rules are out the Defendant do put in his Plea into the Office before the Plaintiff hath entered his Judgment, this Plea is to be accepted, and the Plaintiff ought not then to enter his Judgment ; and therefore it behoves Attornies to be vigilant in their practice. *21. Car. B. r. and 23. Car. Hill.* For a Judgment upon a *Nihil dicit* is for want of a Plea ; but in this Case here is a Plea, and if such a Judgment should be entered, it would be in fact, a false and an irregular Judgment ; and therefore the Court will not suffer him to enter it.

It was said, By Glyn Chief Justice. *Trin. 1657.* That if one be sued in an Action of Trespass and Ejection by Original, he needeth not to plead until the Original be shewed him.

If the Defendant in an *Ejectione firmæ* do not plead in time, according to the Rules of the Court, the Plaintiff may after the Rules for pleading be out, move the Court to set a short day for him to plead, which will be granted, if the Land lye near at hand, and if the Defendant do not plead at the time set by the

the Court, the Plaintiff may enter Judgment upon a *Nihil dicit.* 21. Car. B. r.

A foreign Plea is to be put in upon Oath of the Defendant, that is, he must swear his Plea is true, or else such a Plea is not to be received. *Mich. 22. Car. B. r. Mich. 24. Car. B. r. Because thereby he endeavours to out this Court of its jurisdiction.*

A foreign Plea is when the Defendant doth plead such matter, that if it be true, the cause cannot be tried in this Court; and in regard that thereby the Defendant doth endeavour to hinder the proceedings of this Court, and to delay the Plaintiff, therefore the Court will make him swear his Plea to be true, that the Court may not be deluded, nor the Plaintiff trifled with by a false Plea; and if he will not swear his Plea to be true, the Plaintiff may enter Judgment for want of a Plea. *Trin. 1650. B. S.*

If an Action of debt be brought upon an erroneous Judgment, the Defendant may plead, *Nul tiel Record*, that is, that there is no such Record, as he frames his Action upon. *Mich. 22. Car. B. r. For that which is erroneous, is accounted in Law as null and void. Q. Tamen; for it may not appear to be erroneous until it be disputed.*

If the Defendant do plead a dilatory Plea, the Court at the Plaintiffs motion will order him to plead such a Plea, as he will stand to. *Mich. 22. Car. B. r. For the Law favours not delays, whatsoever is vainly babled by the ignorant to the contrary. And if he be ordered to put in a Plea, to which he will stand, and he do it accordingly, if such his Plea be not good, the Court will not permit him to amend it, but the Plaintiff shall take advantage of it by demurring upon it,*



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*it, or otherwise as he shall be advised ; because he hath abused the favour of the Court in granting him time to put in his Plea, which they intended should be a good Plea.*

In any Action wherein the Plaintiff, in case he recover, shall only recover Damages, the Defendant may plead in bar to this Action an arbitrement with satisfaction thereupon made unto the Plaintiff, although the satisfaction given by the Arbitrators, was less then the Plaintiff suffered by the Defendant ; for it was his own act to refer himself to the Arbitration *Mich. 22. Car. B. r.* And if the Plaintiff have satisfaction, the Law will not intend that he is dammified, and so he hath no Cause of Action.

When the Court doth order one to plead presently, it is to be understood that he shall plead in such convenient time after, as the Court shall judge reasonable. *Mich. 22. Car. B. r.* For the Law accounteth things which are done in convenient time, to be done without delay.

The Defendant may amend his Plea, although it be three Terms after it was pleaded, if he will pay Costs. *Mich. 22. Car. B. r.* But it must be by leave of the Court, because it is against the common Rules of practice, which they will grant if there be cause for it.

Although a Plea do contain divers matters in it, upon which an Issue may be taken, yet this Plea is not double, if the Plea could not have been good, that is, would not have answered the whole Declaration without alledging all those matters in it. *Mich. 22. Car. B. r.* For though the Law doth not allow capcious Pleas, yet it doth not deny the Defendant to plead all such matters that his Case affords for his just Defence.

If the Defendant plead an insufficient Plea, and there is Issue joyned upon that Plea, and a Verdict given upon that Issue for the Defendant; the Plaintiff shall not afterwards take advantage of the insufficiency of the Plea. *Mich. 22. Car. B. r. For it was his own fault to joyn Issue upon it when he might have demurred upon it, and then the Court would have given judgment for him upon the Demurrer.*

Where one Pleads Letters of Administration, which are granted by such an ordinary, whereof the Law doth take notice, he may plead that they were granted unto him, *debita legis forma conuessa sint*; but if they be granted by an inferior ordinary, of whom the Law doth not take notice of, he must plead that they were granted unto him *per ordinarium illius loci*. *Mich. 22. Car. B. r. That the Court may the better judge whether they be well granted in regard of the power of the ordinary that granted them or not; which they may the better do, when it appears by what ordinary they were granted.*

If the Plaintiff do alter his Declaration after the Defendant hath pleaded to it; the Defendant may alter his Plea. *Mich. 22. Car. B. r. For by the amendment of it, it may be so altered in matter that it may require a different answer from what was formerly Pleaded, and in that case if he should not amend his Plea, he might be triced for want of a good Plea.*

In an Appeal brought, all the pleadings are in Latin, but the Counsel ought to Court in French, as in real Actions in the Common Pleas. *Mich. 22. Car. B. r. Because the Statute which Enacted that all Pleadings should be in Latin, did not extend to this Action, and therefore the Pleadings are to be in French, as they were before the making of that Statute.*

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When the Court doth order that the Defendant shall plead, it is intended that he must plead an Issuable Plea. *Mich. 22. Car. B. r.* For the Rule is made to quicken the Defendant, that the Plaintiff be not delayed by his Dilatoriness, and if he might Plead a Dilatory Plea, and not Issuable, the Rule would be to no purpose for the Plaintiffs benefit, but rather for his disadvantage to his greater delay.

The Court will not upon a motion, rule the Defendant to plead peremptorily by a day, before the common Rules of the Court for Pleading be out, but then they will. *Mich. 22. Car. B. r.* For till then it cannot be said that the Defendant hath delayed the Plaintiff, and such Rule is not to be made but where it appears to the Court that the Plaintiff is delayed for want of a Plea.

If a *Scire facias* upon a Recognizance, be brought against an Infant, he cannot Plead Infancy or Non-age to it; for a Recognizance is in the nature of a Judgment, and the *Scire facias* is grounded upon it, but he must bring his *audita querela*, and set forth his case therein, and thereby his age shall be tried by the Court inspecting of him, and by proof of Witnesses, and not by a Jury. *Hill. 22. Car. B. r.* For there is no evidence to be given on both sides, but only a matter of Fact in the Affirmative to be proved on the Infants part.

If the Plaintiff do release his cause of Action to the Defendant, yet the Court will not upon a motion stop the Plaintiffs proceedings in the Action, but the Defendant must Plead this release. *Hill. 22. Car. B. r.* In bar of the Action, for the Court cannot take notice of the release, which is a private Act upon a motion, but by Pleading it, it will appear unto the Court upon Record.

*the Accomplish'd Attorney.* 411

*Also the release is matter of fact, which is properly tryable by a Jury.*

It is not a good Plea, to Plead a Paroll agreement in bar of an Agreement made by Indenture between the parties. *Hill. 22. Car. B. r. For an Agreement by Indenture is a more solemn Agreement, and of a higher nature then a Paroll Agreement, and must be discharged by some act of as high a nature as it is, as the Rule is, Eodem modo quo oritur, eodem modo dissolvitur.*

A double Plea is such a Plea, that one Issue cannot determine all the matter issuable that is contained in it, and also where the Defendant is put to a double answer. *Hill. 22. Car. B. r. And such a Plea is not a good Plea, because a good Issue cannot be joyned upon it with a single Issue, because where there is double matter, no certain Issue can be taken, which is clearly contrary to the nature of an Issue, for an Issue ought to be single, and to be taken upon one single point.*

If the Defendant do Plead a frivolous Plea, to the intent to delay the Plaintiff, and to hinder him from going to a Tryal, the Court will upon the Plaintiffs motion, order the Defendant to Plead such a Plea as he will stand to, or else to accept of a Demurrer from the Plaintiff unto his frivolous Plea. *Hill. 22. Car. B. r. For it is the Justice of the Court to speed the proceedings in Law, and to bring suites to determination as soon as with conveniency and Justice to all parties, it may be done.*

If a Cause have continued four Terms without Prosecution before Issue joyned, the Defendant is to have a Terms Notice to Plead, &c. before Judgment can be entred by default; if after Issue joyned, a Terms notice before the Tryal. Per Magistrum

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*Strum Livesey, & al. &c. P. 21. Car. 2. Regis.*

Where the Defendant may Plead the general Issue, he ought so to Plead, that the whole matter in question may come to be tryed. *Pasc. 23. Car. B. r.* For else the Plea is not good, because it tenders not such an Issue whereupon the Cause depending may be determined; which every Plea ought to do, for to Plead otherwise, is to no purpose; And if the Defendants Plea doth not answer the Plaintiffs whole Declaration, the Plaintiff may well demur.

If one bring an Action upon a Contract, it is a good Plea in Bar for the Defendant to Plead, *quod exoneravit se de Contractu.* *Pasc. 23. Car. B. r.* For it sounds all one, as if he had Pleaded that he hath performed the Agreement; for it shall be intended he hath legally discharged himself of the Contract.

A Concord by Paroll is no good Plea in bar to an Action brought upon a single Bill, though it be not penal. *Pasc. 23. Car. B. r.* For bare words are not of so great force in Law as Agreements put in Writing, because things put in Writing are supposed to be done upon mature advice and deliberation, but words are not presumed to be always so spoken.

Every Plea must be Pleaded either in bar to the Action brought, or in abatement of the Writ upon which the Action is framed, otherwise it is but a discourse and not a Plea, because the Plaintiff cannot take an Issue upon it, and therefore if the Plaintiff do demur upon it, and his demurrer be adjudged good, he shall have Judgment against the Defendant for want of a Plea. *Pasc. 23. Car. B. r.*

Anciently all Pleadings were in French, then by the Statute it was Enacted they should be in Latin. *Pasc. 23. Car. B. r.*



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The Plaintiffs Attorney is not bound to receive a Plea for the Defendant from any person that is not an Attorney. *Pasc. 23. Car. B. r. Q. Whether he ought not to receive it from the Defendant himself, if he tender it to him, or from his Sollicitor if he know him to be so.*

If the Plaintiff do put in a Replication to the Defendants Plea, at any time before Issue joyned, the Defendant ought to Plead unto it, although it did not come in, in due time, according to the course of the Court, *Pasc. 23. Car. B. r. For the Plaintiff doth only delay himself by not putting in his Replication sooner, and the Defendant is not prejudiced thereby.*

The Court will not direct any person how to Plead, although the matter be difficult, though they be moved to do it, but will bid them Plead at their own perils. *Pasc. 23. Car. B. r. For Council are to advise how to Plead, and the Court is only to judge of the Pleadings, whether they be good in Law or not, and not to give Council to the parties, but the usage was otherwise formerly, but is now Antiquated.*

A thing ought not to be pleaded by implication, but in express words. *Trin. 23. Car. B. r. For there can be no Issue taken upon it, because it is not a direct affirmative, to which a negative may be Plead; and Pleadings ought to be plain and direct to the matter in question, and that is the reason that all Argumentative Pleadings are void.*

If one Plead a Deed, he must produce it in Court, but one may give a Deed in evidence, although he cannot produce it, if he can make it out by proofs that there was such a Deed, and so he may do of a Record. *Trin. 23. Car. B. r. For upon Pleading of a Deed, it is fit that the Defendant have a sight of it, that*

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that he may know what defence to make, which he cannot (it may be) do without a sight of it, and every Plea shall be taken to be true, except it be denyed, but an evidence not presumed to be so, but is believed or not believed, as the circumstances of things do weigh with the Jury, who are Judges of it.

Where the Defendant is not constrained to Plead a special Plea, he may Plead the general Issue proper for the Action brought, and give the special matter in evidence. *Hill. 23. Car. B. r.* For every Plea must be so framed that it may give a full answer to the matters set forth in the Declaration, to wit, all such as are material to be answered unto ; and if it do so, it is a good Plea, be it a general Plea or a special.

It hath been adjudged a good Plea in a *Scire Facias* brought against an Executor upon a Judgment entred into by the Testator, to Plead fully Administred; for if he have fully Administred, he is not to be charged ; but it is better for him to Plead that no goods of the Testators are come to his hands with which he could satisfie the Debt, viz. since the bringing of the Writ of *Scire facias* against him, for this seems to be a clearer Plea in bar. *Mich. 22. Car. B. r.*

One may plead a matter in Law, although it do amount to no more then a *non culp.* *Mich. 23. Car. B. r.* For if the party be not guilty by Law, notwithstanding that which is alledged against him be true, it is all one as if the matter alledged against him were not true ; for no man is further guilty of a thing then the Law makes him guilty ; but to Plead *non culp.* is the better and plainer Plea, as I suppose.

A Plea may be amended upon leave of the Court, if it be but in paper and not entred, but the party that

that amends it, must pay costs unto the other. *Hill.*  
*23. Car. B. r.* For it is not reasonable that the Court  
 should grant him favour to the prejudice of the other  
 party, who by this amendment is put to new trouble and  
 charges; but if the Plea be entred in Parchment, and  
 the Record made up, the Court will not give leave to  
 amend it.

A Clerk of the Court ought not to refuse a Plea,  
 although it be not put in in time, but the Plaintiff  
 must move the Court, and abide by their rule therein.  
*Hill. 23. Car. B. r.* For the Court and not the Attor-  
 nies are to judge of the Legality of the proceedings in  
 all Causes depending before them, as well as they are  
 to determine the matters in Law in them.

One that is Endicted of Felony or Treason, ought  
 not by the Law to be admitted to Plead to the En-  
 dictment, until he hold up his hand at the Bar; yet  
 as I remember, Sir *John Stowell* refused to hold up  
 his hand, and yet was admitted to Plead; the hold-  
 ing up of the hand is in the nature of an appearance,  
 which ought to be Recorded before Plea Plead.  
*Pasc. 24. Car. B. r. Q.* Whether it is to be done to  
 the end that the Court, Jury and People may take the  
 better notice of the Prisoner, or for what other reason.

One cannot Plead his pardon for Treason, until  
 he is charged in Court with the Endictment of it.  
*Pasc. 24. Car. B. r.* For it must appear to the Court  
 what the crime is, before they can judge of the pardon  
 of it.

If one tender an Issue in abatement of a Writ, and  
 there is a Demurrer to it, if the Demurrer be over-  
 ruled, there must be a *respondes ouster*, for the over-  
 ruling of the demurrer is not peremptory to the par-  
 ty. *Trin. 24. Car. B. r.* For the matter in question

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is not determined by the demurrer, but only the goodness of the Writ brought ; and if it be adjudged good, the party must answer to the matter contained in it, for this is all the Writ requires, and the Demurrer is not an absolute refusal to answer, but to that Writ, upon supposal it is insufficient. But if Issue be taken upon a Plea in Abatement, as upon a misnomer in the Plaintiff, or other such like Pleading, & it be found against the Defendant, the Jury ought to Assise costs and damages, and the Verdict in that case is final, and there shall be no respondes ouster, as upon a Demurrer, because it is the folly of the Defendant to put himself upon a false Issue, to trouble himself and the Court, and no man shall take advantage of his own wrong, but in the other case of a respondes ouster, he referred himself to the Judgment of the Court, and so there is an apparent diversity in these two cases, Rittiermaster against Stanly. Mich. 21. Car. 2. R. in B. S. And so was the opinion of the Court of Kings upon a Writ of Error, brought upon a Judgment given in the Common Pleas, between Amcotts and Amcotts. Pas. 17. Car. 2. R.

The Pleading of payment upon an Action brought upon a penal Bill, without shewing an acquittance, is but a Plea in abatement of the Writ, but with an acquittance, it is a Plea in discharge of the Action it self. Trin. 24. Car. B. r. *Q. Whether pleading of payment be a good Plea to any intent.*

If one do demur upon such a Plea as ought not to be pleaded, by his demurrer he doth admit the Plea to be a Plea, such as it is. Trin. 24. Car. B. r. For the demurrer is but to try the sufficiency of the Plea.

One may (sometime) Plead a Plea which is properly a Plea in bar by way of abatement ; and a Plea which is properly a Plea in abatement, by way of a

Plea

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Plea in bar. *Trin. 24. Car. B. r.* But this holds not in all cases, but only in some special cases.

A Plea in abatement of the Writ, ought not to be received after the Defendant hath Emparled, for by Emparley he admits the Writ to be good; yet if it be received, and the Plaintiff doth demur to it, the demurrer is good. *Trin. 24. Car. B. r.* For the Plaintiff accepting of the Plea after imparlance, is no prejudice to the Defendant, and therefore it is but reason that he should take advantage of the insufficiency of the Plea, by demurring to it, if he see cause; and it was the Defendants fault to Plead such a Plea as might be demurred unto.

It is intended in Law, that every Plea is entred when it is pleaded, for anciently the Serjeants at Law were to plead all the Pleas in Court at the bar. *Trin. 24. Car. B. r.* And before they were entred they could not Plead them; but now they are not entred usually before they be Plead.

If one be sued upon an Obligation, he cannot be compelled to Plead before he have Oyer of the condition of the Obligation. *Trin. 24. Car. B. r.* Because he cannot tell what to Plead till he understand for what he is sued.

If there be a Verdict given in a cause wherein no issue was joined, this is a *Jeofail*, and it is not helped by the Statute; for the Statute is to help ill issues, and not to supply issues where none are joyned, and therefore there must be a Repleader. *Pasc. 24. Car. B. r.* bringing the matter in dispute in question, for there nothing tryed, and so there can be no Verdict.

Upon over-ruling of a Plea, which is only in abatement of the Writ, there shall be a *respondes ou-* 415.4  
that is, the Defendant shall only be ruled to

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put in a better Plea ; but upon over-ruling of a Plea which is Plead in bar of the Action, Judgment shall be given against the Defendant, for such a Plea peremptory. *Trin. 24. Car. B. r.* But a Plea in abatement is only dilatory, and is not to bring the matter in question to an Issue, but to delay the Plaintiff. *Q. Whether he shall not pay Costs presently, or that they shall be considered after the Verdict given in the case upon the new Plea.*

If a Plea be put into the Office in due time, it is well enough, although it be not delivered to the Attorney of the Plaintiff. *Trin. 24. Car. B. r.* So that he may not enter Judgment for want of a Plea, but it is usual for the Defendants Attorney to deliver a Copy of the Plea to the Plaintiffs Attorney.

In an Action of Debt brought for Rent, upon an Indenture of Demise for years, the Defendant may Plead payment without shewing the Deed, for the Lease shall be intended to be in being at the time the Action brought. *Trin. 24. Car. B. r.* Except the contrary be shewn, and if the Lease be in being, he is bound to shew any discharge for the Rent, for he cannot compel the Lessor to make him any when he pleads it.

A colourable Plea ought to be entred, but that which is no Plea ought not to be entred. *Trin. 24. Car. B. r.* For a colourable Plea is a Plea until it be over-ruled ; for the Court will not spend time to dispute things which are clear.

*Q. Whether one may Plead a Lease for years by indenture without shewing the Indenture.* *Trin. 24. Car. B. r.* It seems the safer way to shew it.

In an Action of Debt brought upon an Obligation, the Defendant is not bound to plead until he

have Oyer of the Condition of the Obligation. *Trin. Car. B. r.* But he may Plead without Oyer of it if he please, and if he do Plead without Oyer, he cannot afterwards have Oyer of it, for he hath waived his advantage and may not resume it.

If one Plead a Plea that is not good, and the Plaintiff doth demur upon it, the Defendant cannot afterwards amend his Plea, without the Plaintiffs consent. *Mich. 24. Car. B. r.* For the Defendant shall not take advantage of his own ill Pleading to delay the Plaintiff, and to put him to more trouble and charge than by the Law he may do.

If the Defendant will plead a Dilatory Plea, he must plead it upon the giving of the first Rule in the Office for the Defendant to plead, and he must plead a Plea in chief after the second Rule given in the Office for the Defendant to plead; and this is the reason that Judgment cannot be entred against the Defendant for want of a Plea, until the time given by the two Rules to Plead be past. *Mich. 24. Car. B. r.* But if he then put in a Dilatory Plea, the Plaintiff may take his Judgment notwithstanding.

If the Defendant hath Pleaded an Outlatory in Disability of the Plaintiff, and that be reversed, he shall not Plead another indisability. Per Magistrum Welsley, & al. &c. P. 21. Car. 2. Regis.

The ancient course of practice was for the Defendant to put in his Plea into the Office, before that the Defendants Attorney did deliver it to the Plaintiffs Attorney, because it is not such a Plea as the course of Court allows of. *Mich. 1649. B. S.* But now it is refused to be done.



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The Master of the Office of the Kings Bench, ought not to suffer the Original Pleas brought into the Office, to be delivered out of the Office, but only Copies of them. *Mich. 1649. B. S. For by the Pleadings in the Office, are the Pleadings made up for the Issue to be tryed, and if any question arise about altering them, they are to be examined and rectified (if any alteration be) by the Pleas in the Office, and not by any Copy of the Plea.*

A Plea that is grounded upon a Statute, if it be not good, is not helped after a Verdict. *Mich. 1649. B. S. For the Statute being the foundation of the Plea, if it be not well laid, the Plea is naught in the very substance of it, and such Pleas are not helped by the Statute of Jeofails. See the Statute.*

If an Action be brought in this Court to recover Lands, and the Defendant emparls; yet he may after imparlance (as it hath been held) plead that the Lands in question are ancient Demefne, and demand Judgment whether this Court may hold Plea of them, though it seems by the imparlance he doth not affirm the jurisdiction of the Court; but if he plead to the Defendant, and make a full defence, he cannot after that plead to the jurisdiction of this Court, for by pleading he hath in effect confessed the jurisdiction of the Court. *Mich. 1649. B. S. 8. Ap. 1650. B. S. P. Q. Tamen. For it hath been doubted and held it could not be after imparlance. Pasc. 1650. 4. Maii.*

If the Plaintiffs Attorney deliver an imperfect Declaration to the Defendants Attorney, and he accept of it; yet he is not bound to plead until the Plaintiff have perfected his Declaration. *Mich. 1649. B. S. For until it be perfected, it is no Declaration, but may well demur, which is the usual practice; it se*

may, for it shall be intended a true Copy, yet it is safe to do it without examining it by the Declaration put into the Office.

If it be doubtful between the parties, whether a Plea be good or not, it cannot be determined by the Court upon a motion made, that the Court would deliver their opinions whether it be good or not, but there ought to be a Demurrer upon the Plea; and upon hearing of arguments thereupon, the Court is to judge whether that Plea be good or bad. *Hill. 1649. B. S. Jan. 26. For the Court will not upon the sudden, and without deliberation, deliver their opinions in things which are dubious in Law.*

If an Indenture be only pleaded by way of inducement, it is not necessary to say, *per Indenturam suam in curia hic prolat*: but if the party do derive any title unto himself by the Indenture pleaded, he must plead it so. *Hill. 1649. B. S. Jan. 26. That the Court may judge whether the title be makes by the Indenture, warranted by it, and that the other party may counter what answer to give unto it; for a bare inducement to a Plea requires no answer to it, because it is not of the substance of it.*

If an Action be brought in the Sheriffs Court in London, and be afterwards removed by a Habeas Corpus into this Court, the Defendant ought to plead the same Term the cause is removed, and proceed to a Trial. *Hill. 1649. B. S. 9. Feb. For the Court will not grant the party to take any advantage by the removing of the cause hither to delay the other party in the course of his proceedings, which would be, if he should not be compelled to plead the same Term the Cause was removed.* 424.

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If an immaterial Issue be joyned, it is not helped by the Statute of *Jeofailes*; but there ought to be a Repleader. *Pasc. 1650. 5. Maii. B. S. vid. Issue. For an immaterial Issue is (in Law) as no Issue.*

A Plea in the late Rebellion that the Plaintiff had not taken the Engagement according to the pretended Act, ought to be pleaded in this manner, *petit ad visamentum curia si volunt procedere, quia querens non subscripsit engagemento.* And when the Plaintiff hath subscribed the Engagement, and made it appear to the Court that he hath done it, it was to be entered upon the Roll, *quod querens subscripsit engagemento* and then the Plaintiff might proceed. It might also have been averred upon the Roll, that the Plaintiff had not taken the Engagement, although he had Judgment in the Cause, and thereby Execution should have been stayed until he had subscribed it. *Tri. 1650. B.S. 3. Julii. All this Plending was long since out of doors.*

If the Defendants plea do not answer all the matters contained in the Plaintiffs Declaration, it is no good plea; but the Plaintiff shall have his Judgment entered against him for want of a plea. *Hill. 1650. B. 31. Jan.*

When a general plea is pleaded, the Attorney ought to set his hand to the plea, and then the Issue is joyned; and if he will not set his hand to the plea, Judgment may be entered for want of a plea; for the Attorney's hand warrants the plea, and before his hand set to it, it is no plea, if it be an ordinary plea. *Hill. 1650. B. S. 5. Feb. But if it be a special Plea, there must a Counsellors hand set unto it, because it is supposed to be advised by Council and Counsellors, to maintain the*

If one be sued by original Writ, he must plead the same Term, in which the original is returned; if the Defendant be Arrested by a *capias* containing the cause of Action exactly as the original, and if such *capias* be returnable the same Term with the original; but whensoever the *capias* is returnable, the Defendant must plead presently if required. *Hill. 1650. B. S. 6. Feb. But it is not so where one is sued by a Latitat, or a Bill of Middlesex. Q. Differentiam & rationem inde.*

If one be compelled to alledge double matter in his plea, yet if he do insist but upon one of them, the plea is not double. *Trin. 1651. B. S. For upon that matter only upon which it is insisted upon, shall Issue be joyned, and the other matter requires no answer.*

If the Plaintiffs Attorney will consent unto it, the Defendant may wave his plea pleaded without moving the Court. By Rolle Chief Justice. *Trin. 1651. B. r. But if he will not consent, it cannot be done without moving the Court; for the common course of proceeding is not to be altered but by leave of the Court, which upon cause shewn, the Court will sometimes give way unto, if the doing of it be not very prejudicial to any party.*

A special plea is a plea, although it have not a Counsellors hand set to it; and therefore Judgment cannot be entred for want of a plea, although a Counsellors hand be not to it, without acquainting the Secondary of the Office and obtaining his leave to do it, for it may be it was not put in for a special plea, and the Plaintiff must not be his own Judge. *Mich. 1651. B. S. Per Rolle Chief Justice. Yet if the Secondary shall adjudge it to be a special Plea, I conceive the Defendant may afterwards have leave to get a*

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*Counsellors hand to it, and shall not be snap'd with a*  
*judgment for want of it.*

The prayer of the priviledge of the Court is not properly a plea, for it was anciently demanded by Writ, although it be now usually allowed by the Court upon the prayer of the party who claims it. By *Latch* Apprentice in the Law of the *Middle-Temple*. And every Plea is either a Plea in abatement, a Plea in bar of a Plea to the jurisdiction of the Court; and the praying of the priviledge is none of these, but only a desire of the party he may not be sued elsewhere, then in the Court where he prays his priviledge.

In the Case of *Cobb and Webb*. Trin. 1659. By the Court. If a Declaration be delivered to a Casual ejector before the *Essoigne* day, if the Tenant in possession will defend the Title, he ought so to plead, that a Tryal may be had the next Term, and ought not to imparl.

#### *Plea.*

Upon a motion betwixt *Briskoe and Arnold*. By *Glyn* Chief Justice. When pleadings are made up and paid for, they shall be accounted as if they were entred, for the entry belongs to Clerks in the Office, and not the Attornies.

If a Declaration be delivered to the Defendants Attorney, or put into the Office after the *Essoigne* day of the Term, the Defendant cannot be compelled to plead that Term, but he may imparl till the next Term. 1652. B. S. For the Term was begun when the Declaration was delivered, and so it cannot be accounted a Declaration of the preceding Term, for the *Essoigne* day is part of the Term. 7. < 103.

*Pardon.*

*Pardon.*

He that will take the benefit of a general Pardon, ought to plead the Statute by which the general Pardon was granted. 21. Car. B. r. 8. Ed. 4. 7. 4. H. 8. That the Court may judge whether his offence be pardoned or not; which they cannot do, except the pardon be pleaded, and that the party shews he is comprised in the pardon, and not excepted out of it.

One that is found guilty of man-slaughter, must sue out his Pardon, or else his burning in the hand cannot be dispensed withal, for man-slaughter is Felony. 23. Car. B. r. For which he is by the Law to be burnt in the hand, except he be pardoned.

26<sup>th</sup>, 3.

*Penalty.*

If a man bring an Action of Debt upon a Bond for performance of Covenant, the Plaintiff shall recover the whole penalty of his Bond, because in Debt the Judgment must be according to the demand, and the demand must be for the whole penalty; for it is the Defendants folly, after he hath obliged himself, not to take care to perform the Condition; but perhaps if his Case will bear it, he may have relief in Equity. 21. Car. B. Regis.

*Perjury.*



*Perjury.*

A false Oath taken before a person that hath not authority by Law to give the party his Oath in that cause wherein he is deposed, is not Perjury. 21. Car. B. r. *For the Oath is Coram non iudice, and it is as if no such Oath had been made.* Q. *Whether the party which Administretb such an Oath is not Indictable?*

An Endictment for Perjury may be preferred against one for taking a false Oath rashly, and for want of consideration; although the party that took the Oath did not do it maliciously, and he may be convicted thereupon; but the fine ought to be more moderate where the perjury is committed out of rashness only, then where it is committed maliciously. Trin. 24. Car. B. r. *For though the Law doth not tolerate offences, though they be committed out of infirmity; yet they have regard to the weakness of man, and will not therefore punish them so severely as offences committed upon premeditated malice to the party against whom they are committed.* Q. *If this being not voluntary Perjury is within the Statute.*

*Process and Proceedings in Law.*

All legal proceedings ought to take commencement by original Writ or by Endictment, or by information. 21. Car. B. r. *Or by Bill of Middlesex or Latitat, which is the original Process of this Court, and is in the nature of an original to cause appearance.*

If a *Capi Corpus* be returned in one Term, the Defendant ought to plead the next Term after the return, so that the Plaintiff may go to a tryal the

same Term, and so it is if the Defendant be brought into Court by a *Habeas Corpus*, or an *alias*, or *pluries Habeas Corpus*. *Mich. 22. Car. B. r.* Else there would be delay in the proceedings, which the Court will not permit.

If one be sued upon a Latitat in the Kings Bench, and Arrested upon it, after he appears he is committed to the Marechal, and if he can find Bail, he is delivered out of Prison into the custody of his Bail, and in both cases he is in the custody of the Marechal; in the first he is in the custody of the Marechal himself, and in the latter he is in custody of the Bail, and they may take him and keep him in custody if they will, and if they let him go, it is an escape in them, for which they shall answer; but it is other ways when one is let to Bail by Mainprise.

One may be impleaded in *Banco Regis* in *Custodia Mareballi*, by Bill without original. *N. B. 243.*

After the Plaintiff is Non-suit, he must begin his Action again, and cannot proceed upon his old Declaration. *Mich. 22. Car. B. r.* For by the Non-suit the cause as to that Action is determined, and the parties have no day in Court; but he may put in the same Declaration again if he please, and proceed thereupon as upon a new Declaration.

After a Verdict, there ought not to be a repleader, but the Plea is discontinued. *Mich. 22. Car. B. r. Q.* For the practice is otherwise.

Where the Defendant brings a Writ of Error to reverse a Judgment given against him, and hath a *Superfedeas* to stay Execution upon the Judgment directed to the Sheriff of that County where the Execution is to be done; and yet he is taken by the Sheriff by vertue of an Execution taken out upon this  
Judg-

*Perjury.*

A false Oath taken before a person that hath not authority by Law to give the party his Oath in that cause wherein he is deposed, is not Perjury. 21. Car. B. r. *For the Oath is Coram non judice, and it is as if no such Oath had been made.* Q. *Whether the party which Administreteth such an Oath is not Indictable?*

An Endictment for Perjury may be preferred against one for taking a false Oath rashly, and for want of consideration; although the party that took the Oath did not do it maliciously, and he may be convicted thereupon; but the fine ought to be more moderate where the perjury is committed out of rashness only, then where it is committed maliciously. Trin. 24. Car. B. r. *For though the Law doth not tolerate offences, though they be committed out of infirmity; yet they have regard to the weakness of man, and will not therefore punish them so severely as offences committed upon premeditated malice to the party against whom they are committed.* Q. *If this being not voluntary Perjury is within the Statute.*

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If one be sued upon a *Latitat* in the Kings Bench, and Arrested upon it, after he appears he is committed to the Mareschal, and if he can find Bail, he is delivered out of Prison into the custody of his Bail, and in both cases he is in the custody of the Mareschal; in the first he is in the custody of the Mareschal himself, and in the latter he is in custody of the Bail, and they may take him and keep him in custody if they will, and if they let him go, it is an escape in them, for which they shall answer; but it is other ways when one is let to Bail by Mainprise.

One may be impleaded in *Banco Regis in Custodia Maresballi*, by Bill without original. *N. B. 243.*

After the Plaintiff is Non-suit, he must begin his Action again, and cannot proceed upon his old Declaration. *Mich. 22. Car. B. r.* For by the Non-suit the cause as to that Action is determined, and the parties have no day in Court; but he may put in the same Declaration again if he please, and proceed thereupon as upon a new Declaration.

After a Verdict, there ought not to be a repleader, but the Plea is discontinued. *Mich. 22. Car. B. r. Q.* For the practice is otherwise.

Where the Defendant brings a Writ of Error to reverse a Judgment given against him, and hath a *Superedeas* to stay Execution upon the Judgment directed to the Sheriff of that County where the Execution is to be done; and yet he is taken by the Sheriff by vertue of an Execution taken out upon this  
Judg-

Judgment, upon moving of the Court they will grant him a Writ of *Superfedeas* to Superfede this Execution, *quia emanavit erroneice. Mich. 22. Car. B. r. For such Execution ought not by Law to have issued out, much less to have been executed, because of the Writ of Error depending, which supposeth the judgment to be erroneous, and so no Execution could be upon it.*

Bills of *Middlesex* are directed to the Sheriffs of *Middlesex*, as *Latitats* are to other Sheriffs; so *Latitats* Issue out to Sheriffs of all other Counties in *England*, as well as to the Sheriffs of *Middlesex*.

Where the Defendant did tender unto the Plaintiff the monies for which the Action is afterwards brought against him, before the Action was brought, and the Plaintiff refuseth them, and will (notwithstanding) sue the Defendant for them upon a motion, and making this appear to the Court, the Court will order the money to be brought into the Court, and will stay the Plaintiffs Proceedings. *Trin. 23. Car. B. r. For the Court will not countenance any one to sue another, who may have right done to him without suit, for this were to encourage men to be vexatious. But the more usual way in Actions sur assumpsit, is to plead it with an Uncore prist.*

Inferior Courts ought to set forth the manner of their continuances upon their Proccesses, and not to expresse them generally. *Trin. 24. Car. B. r.*

The Proceedings in inferiour Courts, are not so regular and formal as the Proceedings are in the Courts at *Westminster*, but are entred only in short notes. *Pasc. 24. Car. B. r. Pasc. 1648. B. S. According to their custom of practice which is allowable, so it be orderly and not against Law.*

If one be Arrested by Process of this Court, and

be thereupon in Custody, and the Plaintiff do not declare against him in three Terms after, the Defendant is by the rules of the Court to go out upon common Bail. *Trin. 24. Car. B. r.* For the Court will presume the cause of Action is not very great, because it is so long before he declares, and they will not compel him to put in special Bail, but where it appears the cause is weighty and requires it.

The continuances in the Process of this Court, are not entred until the Judgment given in the cause proceeded in be entred. *Mich. 1649. B. r.* For not till then the Record is made perfect.

An appearance will help a miscontinuance of Process. *9. Nov. 1650. B. S.* Yet after the miscontinuance, but not after a discontinuance of the Process; for by the discontinuance of the Process it is out of the Court, and cannot be recontinued by the consent of the parties; but by the miscontinuance it is not so.

The bringing of a Writ of Error is a continuance of the Action. *10. Feb. 1650. B. S. Hill.* For the Action is not determined by the Judgment, if a Writ of Error be brought, but is still depending, for the Judgment (it may be) may be reversed, and so the Action remains as if Judgment were not yet given, because the party continues his sute to overthrow the Judgment.

If a cause to be spoken to in Court be entred into the paper of Causes for the day in the Office, although it be not put into the paper of the Causes of the day delivered to the Judges, yet the Court will proceed in them if they be informed of it. *Trin. 1651. B. S.* For it was but a mistake of the Clerk, and it may be Counsel on both sides are retained for that day to speak in it, and if it should be put off, the Cause would thereby be delayed, and the parties put to more charges.

Upon



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Upon a Verdict or a Demurrer (sometimes) the continuances in the cause are not entred, until after a Writ of Error be brought. *Pasc. 1652. B. S.* For it is time enough then to enter them.

Miscontinuance of Process is where one Process is used for another Process, viz. a wrong Process instead of a right. *Trin. 1652. B. S.* But a discontinuance of Process is, when there wants some Process to continue the cause in Court from one day to another.

*Proviso.*

A Proviso in a Deed which sounds in Covenant, is Collateral. *21. Car. B. r.* That is a Proviso which is so penned, that it implies a Covenant in it; for there is difference betwixt a Proviso, and a Covenant of a Deed, for a Proviso doth often go by way of destruction of the whole Deed, or some part of it, or of the estate created by it, but a Covenant always stands with the Deed, and only an Action lyes upon the breach of it.

A tryal by Proviso was ordained by the Statute, to the end that the Defendant might free himself of suits brought against him, by trying the issue depending betwixt him and the Plaintiff, in case the Plaintiff doth not try it as he ought, which he may do the next Term after the Plaintiff should have tryed it, or at any time after that when he pleaseth. *Hill. 22. Car. B. r. Vid. the Statutes 23. H. 8. Cap. 15. and 4. Jac. 3.*

In all Actions lying in London and Middlesex, the Defendant cannot give the Plaintiff notice of trying the Cause by Proviso the same Term Issue is joyned, except the Plaintiff hath first given the

Defen.

Defendant notice of Trial that Term, and made default. Per Magistrum Livesey, & al. Clericos. P. 21. Car. 2. Regis.

If a Proviso in a Deed be insisted upon at a tryal to destroy the Deed in which it is, there must be punctual proof, that the thing provided to be done or not done, was done or was not done according as the Proviso directeth. *Mich. 1650. B. S. For the Law doth not favour the destruction of Deeds or Estates, but doth favour the supporting and maintenance thereof, as much as may stand with the rules of Justice, and therefore doth require so strict proof of things, the doing or not doing whereof goes to the destruction of estate.*

*Pledge.*

The Plaintiffs pledges that he shall prosecute his suit may be entred at any time pending the suit. *Trin. 22. Car. B. r. For the putting in of Pledges is now but a meer formal thing, but what was the ancient use of putting them in. Q. Yet if the Pledges be not entred at all, it is Error, because the Law directs the Plaintiff to find Pledges.*

*Pardon.*

A general pardon doth discharge not only the punishment which was to have been inflicted upon the person of him that did commit the offence pardoned, but also the guilt of the offence it self. *Mich. 22. Car. B. r. It pardons*

}	poenam	{	culpæ.
	reatum		

*So clearly that in the eye of the Law the Offendor is as innocent*

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*as if he never had committed the offence ; so far doth mercy extend therein.*

A Pardon may dispense with the burning in the hand of a person that is convicted for Felony, but without a Pardon it may not be dispensed withal. *Pasc. 23. Car. B. r. By the Court.*

A Pardon in general words is not sufficient upon a conviction for Felony. *Mich. 21. Car. Regis. But the crime for which he is convicted ought to be particularly mentioned.*

The words *Pardonavit, remisit & relaxavit*, in a Charter of Pardon granted to one for Felony, do not restore unto him the goods which he forfeited to the King by his Felony, but the word *restituit* in the Pardon, doth restore him to his goods. *Trin. 23. Car. B. r. For the former words go but only to the Pardoning of the offence, but the latter to restoring to the estate forfeited by the Felony, and so the words in themselves do import in their proper signification.*

A Pardon for treason cannot be pleaded until the prisoner be charged with the Endicement for the offence committed. *Pasc. 24. Car. B. r. For before he is charged by the Endicement, it doth not appear to the Court that he is the person that is pardoned by the Pardon. Vid. Title Endicement.*

If one have a Charter of Pardon for Felony committed by him, the Court ought to allow it upon the prayer of the party that hath it ; but he must produce it at the Bar, and pray upon his knees that it may be allowed. *13. Nov. 1650. B. S. And so it was then said and done in one Goffs Case. For if he produce it not, the Court cannot take notice of it ; and if he pray not the allowance of it, the Court cannot tell whether the party do accept of the benefit of it ; and he doth it on*

to express his thankfulness for the mercy afforded him by the Pardon. Q. Whether the Court can allow a Pardon without a Writ of allowance directed to them for that purpose?

A general Pardon doth pardon publick offences done to the Common-wealth, but it doth not pardon private injuries done to particular persons. *Pasc. 1652. B. S.* For this if it should, it would be to mix mercy and injustice together, to be pitiful to one, and cruel to another in one and the same act.

*Postea.*

The *Postea* is the issue or record engrossed in parchment, upon which a tryal is had; and which is afterwards to be entred in the Roll of the Court, where the Action tryed was brought, when the party enters his Judgment upon the Verdict had at the tryal. *Mich. 22. Car. B. r.* It is called the *Postea* from the word *postea*, which begins that which is entred by the Clerk of Assize upon the record that was tryed after the tryal signifying forth that *Postea* that is afterwards, after the day joyned at such a day and place, and before such a Judge, the Plaintiff and Defendant came, &c. to hear Judgment, that is to try the cause and hear the Verdict, and so sets forth the tryal particularly and the Verdict.

The Court may stay the *Postea*, not suffering the party to enter Judgment upon his Verdict, if they have a good cause to do it. *Mich. 22. Car. B. r. viz.* For the undue practice in the proceedings to the tryal, although the Plaintiffs cause was good; for it is not enough to have a good cause, but it must be also legally prosecuted.

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The Defendant hath four days by the rules of the Court to speak in Arrest of Judgment after the *Postea* is brought into the Court, and if the party for whom the Verdict passed, will not bring it in upon notice given to him by the other party, that he intends to move in Arrest of Judgment; the Court upon a motion setting forth this matter, will order Judgment to be stayed, until four days after it shall be brought in. *Vide Notice.* That the Defendant may have time to consider upon the Record what to move out of it in Arrest of Judgment.

There is no general Rule of Court for the Clerk of the Assize to bring in the *Posteas* into this Court by a precise time; for sometimes possibly he may be able to bring it in sooner then at another time; but if he be negligent, and return them not in convenient time, the parties grieved may move the Court, and thereupon the Court will make a rule that he bring them in speedily. *Mich. 22. Car. B. r. To avoid further delay to the party concerned.*

If the Clerk of the Assize have mistaken himself in drawing up of the *Postea*, as sometimes it falls out to be, he may amend it by his notes which he took, and drew it up by; although it be returned. *Trin. 24. Car. B. r. But it must be before it be filed, for then it is a record of this Court, and may not be altered.*

After the *Postea* is entred upon Record, and the Record hath been read in Court, in order to the speaking to some matter in Law in it, the Attorney in the cause ought not to have the *Postea* any longer in his custody, but it ought to remain in Court. *Trin. 24. Car. B. r. As a Record of the Court, and in the custody thereof.*

The Defendant may give rules in the Office for the Plaintiff to bring in the *Postea*, if he do it not in due times; and if he will not do it, when the Rules are out he shall be Non-suit. Q. 18. Nov. 1650. B. S. For though he have a Verdict, yet he hath no Judgment, and so his suit is not determined, and so shall be Non-suit for not proceeding on, and the Court will intend that he will proceed no further, and the Defendant is not to be tyed to attend upon his proceedings upon incertainties.

Although the Verdict given be prejudicial to the Plaintiff, as he conceives, yet he ought to bring in the *Postea*. Pasc. 1651. B. S. 13. Mii. For he must abide by the tryal, though it may prove prejudicial unto him, that if he will not enter the Verdict, the Defendant may.

A *Postea* is a record of this Court trusted with the Attorney in the cause by the Clerk of the Assize, and the Attorney is bound, if he be so trusted, to deliver it into the Office, that the Judgment may be entered by it by the Officer of the Court. Trin. 1651. B. S. And if he do it not, the Court will enforce him to do it.

It is not necessary to annex the *Distringas* unto the *Postea*, although it is usual so to do. Trin. 1651. B. S. For they have no relation one to the other.



*Presumption.* *Mich. 22. Car. B. r.* For this would be a foreign construction, and

2. Where the Plaintiff doth declare in an Action of Debt for Rent behind, due upon an Indenture of Demise for years, it shall not be presumed that there is any other Rent due, or Lease made then that upon and for which the Plaintiff doth declare. *Mich. 22. Car. B. r.* For this would be a foreign construction, and for which there is no inducement to warrant it.

3. Where divers houses are let to one by one Lease the Court will presume that the Lessee is in possession of them all, if he be in possession of any of them, if the contrary doth not appear. *Pasc. 24. Car. B. r.* For although the Lessee may possibly have passed away his interest in some of them to other persons, or the Lessee did not enter into them all by virtue of the Lease yet this not appearing to the Court, they will not presume it to be so, but will judge that the Lease took effect as to all.

4. One Court of Justice will not presume that another Court of Justice will do injustice, except it do plainly appear unto them that it is so. *Pasc. 24. Car. B. r.* For each Court ought to have an honourable opinion of the proceedings of another Court.

### Ports.

The Cinque Ports are not absolutely exclusive of the Common Law, so that it may not intermeddle in some Cases, with the proceedings in their Court. *Mich. 22. Car. B. r.* For the Common Law is the universal and supream Law of the Nation, and no part

ought to be so privileged, either by custom or charter, as totally to be exempted from its jurisdiction; for this might cause a failer of Justice in some cases, if it should be so, which this Court will not suffer if there be complaint made thereof.

A Writ of Error to reverse a Judgment given in the Cinque Ports, is to be brought before the Warden and Constable of Dover. Mich. 22. Car. B. r. For theirs is the supream Court, when the other inferiour Courts are subordinate.

Whether a Certiorari lies to any of the Cinque Ports hath been a question. Pasc. 23. Car. B. r. Yet a Certiorari was granted out of this Court, to remove a Judgment given at Dymchurch in Kent, being a limb of one of the Cinque Ports, in Rook and Knights case. Mich. 22. Car. B. r. Rot. 381. moved by Launcelet Johnson of the Inner Temple; this was granted upon a suggestion of a failer of justice there.

*Property.*

He that hath the Land that lies on both sides of a High-way, hath the Property of the soil of the High-way in him, although the King hath the privilege for his people to pass through it at their pleasures; for the Law preumes that the way was at the first taken out of the Lands of the party that owes the Lands that lye upon both sides of the way. Mich. 22. Car. B. r. By Rolle. Q. So that it seems it is called the Kings High-way, because of the privilege that the King hath in it for his people to pass and repass through it, and not in respect of any property he hath in the soil it self; yet divers, as of Mannors, do claim the soil as part of their wast.

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He that hath the goods of another person delivered unto him to keep, hath a special Property in them, by reason of the delivery of them, and may maintain an Action against a stranger that shall take them out of his possession ; although they be not his own proper goods. *Hill. 22. Car. B. S. Because an Addition doth lye against him to whom they were first delivered by him that did deliver them, if he shall not re-deliver them when he is demanded to do it ; and therefore it is reason that he should have a property in them against all other persons whatsoever.*

A Legatee of goods hath no Property in the goods bequeathed unto him before they be delivered unto him by the Executor or Administrator. *Mich. 23. Car. B. r. For the property of them is not altered by the Will, so long as they are in the possession of the Executor or Administrator.*

The Rector of a Parish Church shall be intended to be the proprietor or owner of the Tithes of the Parish, if the contrary be not shewed. *Trin. 24. Car. B. r. Because generally, and by the Law, Tithes do belong to the Rector, although in many places they do not, where there are impropriations.*

If the Sea or a River shall by violent incursion and breaking forth, carry away the soil of one, in so great a quantity that he that had the property in the soil can know where his Land is, he shall have it ; but if his soil or land be insensibly, or by little and little wasted by the Sea or the River, he must lose his Land. *Pasc. 1650. B. S. 11. Maii. Because he cannot prove which is his Land.*

If one to support the credit of a Bankrupt, will suffer the Bankrupt to have his goods in his custody, and to dispose of the Property of them, the Property

the goods shall be accounted to be in the Bankrupt, and the other upon a tryal for the property of them, shall be judged to have lost his Property in them. *Pasc. 1651. B. S. 18. Ap.* Because by so doing he was a case in part that others were deceived by the Bankrupt, whose credit he supported, and therefore he is justly punished for his fraudulent dealing to the prejudice of others.

*Partition.*

A Partition of Lands ought to be made according to the quality, and the true value of the Lands, and not according to the quantity or equal number of acres. *Hill. 22. Car. B. r.* For the Partition ought to be equal in value, which is so in the former, but may not be so in the latter, viz. the Division by equality of acres, for some Land is of greater value then other.

*Payment.*

Payment of money before the day of Payment appointed, is in Law a Payment at the day. *Mich. 22. Car. B. r.* For it cannot be in Presumption of Law, any prejudice to him to whom the payment is made, to have his money paid before the time; and if it be paid before the day, it is paid at the day, and it appears by the receipt of it, that it is for his own advantage to receive it then.

In an Action of Debt brought for Rent due upon Indenture of Demise of Lands, the Defendant may plead payment without a Deed, and it is a good Plea in Bar of the Action. *Trin. 21. Car. B. r.* Be-

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*cause the Lessee cannot compel the Lessor to make him any discharge by Deed or Writing upon payment of the Rent ; and therefore it is not reason he should be compelled to plead payment by Deed.*

If one buy any thing of another, he that buys it, must pay the money contracted for to be paid for it, before the seller is bound to deliver him the thing sold. *Pasc. 24. Car.* For the contract doth imply such a condition in it, viz. That the buyer paying so much money to the Vendee, that the Vender shall thereupon deliver the thing sold to the Vendee.

A Payment of money shall be interpreted to be made according to his intention that pays it, and not according to his intention that receives it. *Mich. 1650. B. S. 22. Nov.* For every one ought to interpret the intention of his own act, and not another, for this is but reasonable.

### *Procedendo.*

If this Court do proceed to try a Custom of London, there the Party may move for a *Procedendo*, that the cause may be removed into London, that the Custom may be tryed there, for it cannot be tryed here, and so if a *Procedendo* should not be granted, the cause would remain untryed, and the party that brought the Action, would be without remedy. *Hill. 22. Car. B. r.* Which the Law leaves no man without, much less will hinder Justice to be done.

After the Defendant hath filed Bail in this Court, a *Procedendo* ought not to be granted, much less after issue is joyned in the cause. *Pasc. 23. Car. B. r.* For by accepting of the Bail, the Plaintiff hath admitted the jurisdiction of the Court, and it is then too late to

move for a *Procedendo*, much less after *Issue* joyned when the Cause is ready for a Tryal.

It is not necessary that a *Procedendo* do agree in form with the *Habeas Corpus*, by which the cause was removed into this Court; but it is sufficient if it do agree in matter and substance with it. *Trin. 24. Car. B. r.* That it may appear that it is to proceed in the same cause that was removed.

If the Defendant hath put in Bail in this Court, upon the removal of the cause hither by *Certiorari*, or *Habeas Corpus cum causa*, if afterwards the Bail be disallowed by the Court, if the Defendant shall refuse to put in better Bail, such as the Court shall approve of, a *Procedendo* may be granted to the Plaintiff to remove the cause back again to try it where the Action was first laid. *Mich. 24. Car. B. r.* For disallowing of the Bail, makes the Defendant to be in the same condition, as if he had put in no Bail; and until Bail be put in, this Court is not possessed of the Cause so as to proceed in it.

If a *Certiorari* to remove a cause, be returned before a Judge and not in Court, and there follows no proceedings in the cause after the *Certiorari* returned, if the party who is concerned will move for a *Procedendo*, he must move for it before the Judge, before whom the *Certiorari* was returned, and not in the Court whither the cause is removed. *Mich. 1649. B. S.* Because the Judge hath been formerly acquainted with the return of the *Certiorari*, and may have better knowledge, why it was granted, and therefore the Court will not intermeddle to undo what the Judge hath done.



*Practice.*

If the Attorney for the Plaintiff do tell the Defendants Attorney, that he is content to stay for a Plea till such a time, and yet doth in the mean time enter Judgment for want of a Plea, this is not fair practice; but if this be made to appear to the Court, the Court will vacate the Judgment, and force him to accept of a Plea. *Hill. 22. Car. B. r. For the Law will not countenance fraud and falshood in the proceedings thereof, nor suffer advantages to be taken thereby, but loves plain and fair practice.*

It is not fair practice for the Defendants Attorney to Demur to the Plaintiffs Declaration without probable cause, but only to gain time to plead. *Trin. 23. Car. B. r. For this is apparent cause of delay, which they ought not to be instrumental in against the known Rules of Practice.*

*Priviledge.*

If one that is a Priviledged person in one Court, do sue another that is a Priviledged person in another Court, he that is sued shall not have his priviledge allowed.

No priviledge is to be allowed to one that hath an Indictment preferred against him, although he be a Peer of the Realm. *Mich. 22. Car. B. r. For an Indictment is at the sute of the King, and against him no Priviledge is to be allowed, for all Courts of Justice are his, and he may sue where he please, for he shall be tryed per pares, which is a great Priviledge.*

One that was coming unto this Court to attend upon

upon his cause, was arrested as he was coming, and was forced to put in Bail; but upon a motion, and making it so to appear unto the Court, he and his Bail were both discharged. *Mich. 22. Car. B. r.* And the party that Arrested him had been also punished, had he not pleaded that he knew not that the party came about his business depending in the Court; for the doing of this was an affront to the Court, as well as an injury to the party Arrested.

One may have a Priviledge in the Land of another by prescription; although he hath no title to the freehold or soil. *Pasc. 23. Car. B. r.* For although he now have it by prescription, it might arise originally by grant, and whatsoever lies in grant, may be claimed by prescription, so that the prescription in this case is not unreasonable.

One that is Priviledged in this Court, ought not thereby to claim his Priviledge to have a tryal at the Bar for to try the title of Lands which he claims in remainder. *Trin. 23. Car. B. r.* For it is uncertain whether the remainder may fall whilst he continues a Priviledged Person, and for the present he claims no present interest in the Lands; nay, though he had a present claim to them, yet he ought not to be so Priviledged, if the Lands in question be not of a great value, or else the title very difficult to be tryed; and in such cases, any other person, though not Priviledged, may have a tryal at the Bar; and tryals for Land ought by the Law to be in the County where the Lands lye.

A Priviledged person shall not be allowed his Priviledge upon a motion for it to the Court; but he must appear and plead his Priviledge, and upon his pleading it, he shall be allowed it. *Mich. 23. Car. B. r. Q.*

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A *Philisers* Clerk did claim to be Priviledged in this Court, but was denyed it. *Mich. 23. Car.* For though the master may be Priviledged, yet the Court takes no notice of the servant, for he hath no necessary dependance on the Court.

The Lord Mayor of the City of London is Priviledged from all Actions during his Maioralty, in regard of his Office, except it be for Felony or Treason or Actions which concern Free-hold ; this is, that he may not be hindred in the Government of the City which being the Metropolis of the Nation is of higher concernment, in respect of the publick, than any mans particular interest. *Pasc. 24. Car. B. r.* For these are matters of a high nature, and it much concerns the Publick to have speedy Justice to be done in them.

A Member of Parliament is Priviledged, as well in his Lands and goods as in his person. By Rolle Chief Justice. *Mich. 24. Car. B. r.* In the Case of the Lord Mohune. For by being disturbed in any of them, he is hindred in serving of the Common-wealth, which is to be preferred before all private interests whatsoever.

An Attorney of this Court that is sued as an Executor, is not to be Priviledged, for he is sued in the right of the Testator, and not in his own right. *P. 1650. B. S. 7. Maii.* And his personal Priviledge is not applicable to him in any other relation, then as being an Attorney of the Court.

The prayer of Priviledge is not properly a Plea for a Priviledged person did anciently demand his Priviledge by Writ, but of latter times the party has been admitted to his Priviledge upon his prayer to the Court. By *Latch Apprentise. 1654. B. S. V. antea Title Plea and Pleading.*

## *the Accomplish'd Attorney.* 445

A Clerk of this Court is not bound to lay any personal Action which he brings against another out of the County where this Court doth sit. *Mich. 22. Car. B. r.* But by his privilege he may lay it here, notwithstanding the Cause of his Action did arise in another County; and he is thus privileged in regard of the constant attendance he is tied to give in this Court; yet in real Actions he is not thus privileged; For such Actions are local, and must be tried in the County where the Cause of Action did arise, wherein no Privilege can be pleaded.

In the Case betwixt Oliver Protector and Syndercomb. *Hill. 1656.* The Privilege of the Court was prayed, and granted to protect a Witness from being Arrested in coming or going from the Court, who was to give evidence for the Protector upon an Endicement of High Treason preferred against Syndercomb. *Nota.*

In the Case of Robinson and Wright, it was ruled, that though Robinson was an Alderman of London, yet he ought not to be privileged to continue his Action in London, where the cause of Action arose in another County, and was a personal Action.

One that hath a sute depending in this Court is privileged by the Court from Arresting, in coming hither from his house or lodging to follow his Cause, and also in departing from the Court back again, directly to his house or lodging; and if he be Arrested in so doing, the Court upon a motion made to inform them of it, will set the party at liberty, and punish him that Arrested him, if he did know he had a sute depending here, and came hither to attend it. Were it otherwise, it might be very mischievous to the party.

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## 444 *The Practical Register ; Or,*

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An Attorney of this Court that is sued as an Executor, is not to be Priviledged, for he is sued in the right of the Testator, and not in his own right. *Pasc. 1650. B. S. 7. Maii.* And his personal Priviledge is not applicable to him in any other relation, then as he is an Attorney of the Court.

The prayer of Privilege is not properly a Plea for a Priviledged person did anciently demand his Priviledge by Writ, but of latter times the party hath been admitted to his Priviledge upon his prayer to the Court. By *Latch Apprentise. 1654. B. S. Vile antea Title Plea and Pleading.*



A Clerk of this Court is not bound to lay any personal Action which he brings against another out of the County where this Court doth sit. *Mich. 22. Car. B. r.* But by his priviledge he may lay it here, notwithstanding the Cause of his Action did arise in another County; and he is thus priviledged in regard of the constant attendance he is tied to give in this Court; yet in real Actions he is not thus priviledged; For such Actions are local, and must be tryed in the County where the Cause of Action did arise, whereunto no Priviledge can be pleaded.

In the Case betwixt Oliver Protector and Syndercomb. *Hill. 1656.* The Priviledge of the Court was prayed, and granted to protect a Witness from being Arrested in coming or going from the Court, who was to give evidence for the Protector upon an Endictment of High Treason preferred against Syndercomb. *Nota.*

In the Case of Robinson and Wright, it was ruled, that though Robinson was an Alderman of London, yet he ought not to be priviledged to continue his Action in London, where the cause of Action arose in another County, and was a personal Action.

One that hath a sute depending in this Court is priviledged by the Court from Arresting, in coming hither from his house or lodging to follow his Cause, and also in departing from the Court back again, directly to his house or lodging; and if he be Arrested in so doing, the Court upon a motion made to inform them of it, will set the party at liberty, and punish him that Arrested him, if he did know he had a sute depending here, and came hither to attend it. Were it otherwise, it might be very mischievous to the party.

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The wife of an Attorney of this Court, if she be Arrested, ought not to claim the priviledge of this Court, not to put in bail to the Action, as her husband may, if he be Arrested ; but her husband must put in bail for her, and for want thereof she is to be committed to Prison. Trin. 1650. Jun. 25. B. S. For her husband is priviledged only in regard of his personal attendance upon the Court, and of that only which the Court hath upon him in regard of his relation to the Court, and so it is only a personal priviledge annexed to his person, and concerns not his wife. Vid. Aux. 262. plus de Priviledge.

In the Case between Ridley and Carr. Pasc. 1656. B. S. It was said by Glyn Chief Justice, and so ruled, that if an Attorney of this Court do absent himself for a year from the Court, and gives no attendance, he doth by the new rules forfeit his priviledge.

## Prohibition.

*Handwritten:* No Doubt but for the Substantive of the Cause. But they do not look for it. Bk. 6. Am. in L. 1. 8. 3. m. y for the Court of Admiralty to stay their proceedings, upon a suggestion that they did hold Plea there, upon a promise which was made *infra corpus comitatus*, and so not triable there, but at the Common Law ; It was said by the Court, that the surmise must be absolute, that the promise was made *infra corpus comitatus*, and not, that if there was any promise made, it was made *infra corpus comitatus*, for this is uncertain, for it appears not thereby whether there were any such promise made or no, and upon an uncertain surmise no prohibition can be granted ; for no Issue can

can be taken upon it, though it should be false. *Hill.*

*21. Car B. r.*

This Court may by the Common Law grant a Prohibition to the Court of Admiralty to stay their proceedings, if they hold Plea of any matter, which the jurisdiction of their Court doth not extend unto.

*Mich. 22. Car. B. r. For this Court is to regulate all other Courts in their jurisdictions, and not to suffer them to usurp Authority where they have none.*

A Prohibition doth lie in all Causes, wherein a Habeas Corpus doth lie at the common Law. *Mich.*

*22. Car. B. r. For this Court hath power as well to see Justice done concerning a mans estate, as to his person.*

Although it be questionable, Whether a Prohibition do lie in the Case wherein it is moved for; Yet this Court will grant it, so that the parties concerned may appear here, and plead, or demur, as they shall be advised, to the intent the matter may come in question here and be decided, whether a Prohibition do lie in the Case or not? but if it appear to the Court clearly that a Prohibition doth not lye, the Court will not grant it. *Mich. 22. Car. B. r. And if it shall appear to the Court that a Prohibition doth not lye, the Court will then grant a consultation, whereby the party that was stopped in his proceedings by the Prohibition may now proceed in that Court to which the Prohibition was directed. Mich. 22. Car. B. r.*

A Prohibition may be granted to the Prerogative Court, to hinder them from granting Letters of Administration against the Law, or to hinder any other proceedings which are not consonant to the common Law. *Hill. 22. Car. B. r.*

Where

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Where there is a sute depending in the Ecclesiastical Court for a personal Estate, and also for Lands, a Prohibition may be granted to stop their proceedings there, as to the Lands only, and they may (nevertheless) proceed there as to the personal Estate. *Pasc. 23. Car. B. r. For as to the one they have Jurisdiction, and as to the other they have none.*

If the Common Law and the Spiritual Law do differ in the way of their proceedings, in matter of substance, and the Ecclesiastical Court will proceed according to the course of their Law, this Court will grant a Prohibition to stop their proceedings. *Pasc. 23. Car. B. r. For in things doubtful, the Common Law is to be preferred before the Spiritual Law, as being the more general Law, and more tending to the general good of the people, and the publick peace of the Nation, and that which best suits with the constitution of the Nation.*

If the Court of the Lord Mayor of London shall hold Plea of a Cause after it is removed into this Court by a Writ of Certiorari; This Court may grant a Prohibition to that Court to stop their proceedings there. *Trin. 25. Car. B. r. For after it is removed they have no further Consuance of the cause, and therefore if they shall proceed, this Court will hinder their proceedings.*

A Prohibition may be granted out of this Court to any other Court that doth proceed in any cause, which doth not lie within their Jurisdiction. *Trin. 23. Car. B. r. For such proceeding is to exceed their Authority, which this Court will not suffer, but is to keep all other inferiour Courts within their own bounds.*

A Prohibition may not be granted to an inferiour Court to stop their proceedings in a Cause which doth

doth not lie within their jurisdiction to try, after that the Defendant hath allowed the jurisdiction of the Court by pleading to the Action. *Trin. 23. Car. B. r.* for it is then too late to move for a Prohibition, for he ought before he had pleaded, to have demurred to the jurisdiction of the Court, and then if they had proceeded, he might have had a Prohibition, or without a Demurrer, I conceive he might have moved for a Prohibition, and have had it granted.

The Defendant in the Court of Admiralty may have a Prohibition to that Court after he hath pleaded there, although he cannot have it to an inferiour Court after he hath pleaded; for an inferiour Court doth not draw the matter in question *ad aliud examen*, but doth proceed therein according to the common Law; but the Court of Admiralty doth draw the matter *ad aliud examen*, that is, to try it by the civil Law. *Trin. 23. Car. B. r.* And therefore this Court will use their Authority at any time to stay their proceedings in the Admiralty, although the Defendant move by his incantelous pleading allowed their Jurisdiction, because not only the party that prays the Prohibition is injured by their proceedings, but the Common Law it self, which the Judges are bound to maintain.

It is not necessary for him that Libels in the Court of Admiralty, to shew in his Libel, that the Common Law hath no Jurisdiction of the matter for which he Libels, for that is taken for granted upon preferring his Libel; but he that prays a Prohibition to the Admiralty in this Court, must suggest something, wherein in respect of the Cause depending there, and for which he prays the Prohibition, the Court hath no Jurisdiction of the Cause. *Hill.*

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23. Car. B. r. For the Admiralty cannot determine whether the Common Law have Jurisdiction or not and therefore it would be a vain allegation; but this Court can judge of the Jurisdiction of the Court of Common Law, and can determine whether other Courts do intrench upon their Jurisdictions, or not.

If the Court of Admiralty do hold Plea of any matter, which is not maritime, although the thing were done upon the Sea, yet this Court will grant Prohibition to stop their proceedings. Hill. 23. Car. B. r. For the Court of Admiralty hath only Jurisdiction in maritime Causes, viz. such as only concern sea affairs, and not of all matters done at Sea, as Contracts, &c. the Tryal whereof belongs to the Common Law only, and not to the Admiralty.

This Court will grant a Prohibition to the Admiralty, if there be cause for it, although that a consultation have been granted in the Court of common Pleas in the same cause. Hill. 23. Car. B. r. For the Court is not bound by the rules of the common Pleas, if they differ from them in opinion.

This Court ought not to deny the party a Prohibition that doth pray it, if there appear cause for Prohibition, for it is not a thing arbitrary, or *gratia curie* to grant it, or not to grant it. Hill. 23. Car. B. r. For to deny it were to deny Justice to the party, in denying him the benefit of the common Law which is every free-born English-mans birth-right which he may challenge as his right and inheritance.

A Prohibition may be granted to the Spiritual Court after a sentence given in the Cause in the Court, for which the Prohibition is prayed, if the Cause be just, but the Court will not do it, until the Cause be just.



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have heard Councel speak on both parts to inform their consciences, although before a sentence they use to grant it upon a bare suggestion of the party. Tuesday 2. July. 1650. B. S. and Pasc. 1652. B. S. For a sentence in an Ecclesiastical Court is in the nature of a Judgment given at the common Law, and presumed to be given upon mature deliberation, and therefore this Court will not, but by good advice, make a sentence there given void, or hinder the execution of it. So great respect doth this Court bear to the judicial proceedings of other Courts.

A Prohibition doth not lie to the Court of Admiralty in cases of Felony which are to be tryed there; yet if there be cause, this Court will grant a Certiorari to remove the Cause hither. By Rolle Chief Justice in Dothicks Case. 29 Oct. 1650. B. S. Q. T. *quia curia advisare vult.*

Trin. 1659. By the Court. If an Action be brought in an inferiour Court, and the Defendant tenders a Plea there, that the Cause of Action is not within the jurisdiction of the Court, if they refuse this Plea, this Court will grant the Defendant a Prohibition to stay their proceedings in the Cause.

*Party and Privy.*

Where one desires to be made a party to defend the title of the Land in question, in an *ejectione firmæ*, the Court will grant it, so that he will confess Lease, Entry and Ouster. Pasc. 23. Car. B. r. In Prince and Warners Case. 2. Maii. 1648. But now that rule is enlarged, for he must now confess Lease, Entry, and Ouster, and must not except against the Jury for want of Hundreders, but insist only upon the Tryal of the

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*the Title ; and if at the Tryal he do not all this, then Judgment is to be entred against the Lessors own ejector ; this is according to the new way of practice, but antiently the practice was otherwise.*

### *Purchase.*

An Alien cannot purchase Lands in England, because by this means the Realm would be impoverished by transporting the treasure out of the Realm into foreign Countries ; and by putting thereby part of the Lands of this Realm, that is to say, the Lands Purchased by the Alien, under the power of a foreign Prince. *Pasc. 23. Car. B. r.* For not only the subject person but his estate also is in a sort under the power of his Prince.

### *Prescriptions.*

One cannot prescribe to have two several ways by one joynt Prescription, but he must make several Prescriptions for them. *Trin. 23. Car. B. r. Q.* For they might both begin by grant at one and the same time.

Two Tenants in Common cannot prescribe for one Warrein. *Trin. 23. Car. B. r.* That is severally for they cannot both have it severally, but in common.

A Copy-holder for life cannot Prescribe against his Lord, by reason of his Copy-hold, but a Copy-holder in Fee may prescribe, for he holds his Copy-hold in the nature of an inheritance. *Mich. 6. N. B. S. 1650.* But an estate for life may be so short, that a prescription cannot lye for him ; but Copy-holders ife may alledge a custom against their Lord.

*Parish.*

A Parish may comprife many Vills within it. *Hill. 23. Car. B. r. 24. Car. Pasc.* Yet generally a Parish shall not be accounted to have any more then one Vill in it, except the contrary be shewed. *Hill. 23. Car. B. r.* Because most Parishes have but one Vill within them.

It shall not be intended that there is more then one Parish in a City, except the contrary be made to appear. *Trin. 23. Car. B. r.* For some Cities have but one Parish. *Q. Tamen, For very few Cities in England have but one Parish, and me seems intentions should follow the major part.*

If the father of poor children leave the Parish, and leave his children in the Parish, if the children have a Grandfather in the Parish that is able to keep them, the Parish is not bound to maintain them, but the Grandfather. *Mich. 24. Car. B. r. See the Statute.*

If a High-way lye within a Parish, the Parish within which it lyeth is bound to repair it of common right, if it do not appear that some other persons are bound by Law to repair it. *Mich. 1650. B. S. 24. Oct.* For it shall be intended that the Parishioners, where it lies, have the greatest benefit of it, and do make the most use of it, and it is most convenient and equal for the Parishioners in every Parish to repair the ways within it, if they be able to do it.

*Presentation.*

If the King do present to a Church by Laps, where he ought to present *pleno jure*, and as Patron of the Church; such a presentation is not good. *Hill. 23. Car. B. r. For the King is deceived in his grant by mistaking of his Title, which may be prejudicial to him.*

The King may present to a Church by his letter sent to the Ordinary to institute and induct such an one his Clerk to the Living. *Mich. 1649. B. S. Q. Whether he may do it by Paroll; and it seems to me he may, for a Letter is but a signification of his pleasure therein to the Ordinary, which he may as well signify by word as by writing.*

*Principal and Accessory.*

One that is present and aiding to the stabbing of another, is not a Principal, but only an Accessory to the stabbing, within the Act of 1. Jac. that made stabbing to be murder. *Hill. 23. Car. B. r. For the Act shall not be largely interpreted, because so penal. See the Statute.*

*Proof.*

Although a record of a thing be lost, yet if the matter may be proved by circumstances to a Jury, it is sufficient proof. *Pasc. 24. Car. B. r. For the right doth not wholly depend upon the Record, but upon the agreement of the parties to the Record, but a Record is*

make the right more clearly appear, and to preserve the memory of it to posterity.

If a Deed which is to be given in evidence at a tryal, be enrolled, there needeth no other proof of the Deed, then to shew the endorsement of the Enrollment. *Mich. 1649. B. S.* For before a Deed can be enrolled, the party to the Deed doth acknowledge it before a master of the Chancery, that the Deed to be enrolled is his Deed, if the Deed be to be enrolled there, before a Judge of that Court where it is enrolled, which is a sufficient authority to enroll it, and to give credit to the Deed, and the endorsement of the enrollment upon the Deed is to be credited, because it is made by a known Officer intrusted for that purpose. But I conceive the more unquestionable proof, is to prove upon Oath that it agrees with the enrollment it self, but the most sure proof is to prove the execution of the Deed by Witnesses, if it may be.

A provisoe in a Deed, which provisoe goes in destruction of the estate passed by the Deed, must be punctually proved. *Mich. 1649. B. S.* For the Law doth not favour things which sound in destruction of estates, but such things as tend to the affirmand preservation of them. *Vid. antea.*

If a place be named with an *alias*, it is not necessary upon a tryal to prove both the names. By Rolle Chief Justice. *Mich. 1650. B. S. Q. Tamen, For Crawley when he was Justice was of another opinion, for he held both but one name.*

A Deed which is enrolled, and is not acknowledged before a Master of the Chancery (as a Deed which is enrolled *ad perpetuam rei memoriam*, and not to pass an estate) must be proved by Witnesses, if it be given in evidence at a tryal. *Mich. 1649. B. S. For*

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*the acknowledging of it before the master, is that which gives the chief credit to the Deed, and not the Endorsement of the Enrollment, which is but the act of a Clerk in the Office, though accounted the act of the Master of the Office.*

A thing which is Proved to have been and continued for so long time as any one living can remember, shall be presumed to have been beyond the memory of man, and will be accounted a good prescription. *Pasc. 1650. B. S. 11 Maii. Because the contrary cannot be proved.*

### *Plaint.*

A *Plaint* is the cause which the Plaintiff doth express in the Writ, for which he complains to the King against the Defendant, and for which he doth obtain his Writ. *21. Car. For as the King denys his Writ to none, if there be cause to grant it, so he grants not his Writ to any without there be cause alledged for it; for as the King is bound to help them to right that suffer wrong, so he is bound (as much as in him lies) to defend his people from causeless vexation.*

A *Plaint* in an interior Court, is in the nature of an original Writ. *Pasc. 1652. B. S. For therein is briefly set forth the Plaintiffs cause of Action.*

### *Poor.*

If the Father of Children do leave the Parish where he dwelleth, and there is a Grandfather of the Children to be found, this Grandfather, if he be able is chargeable with the keeping of the Children, and not the Parish. *Mich. 24. Car. B. r. For the ty*

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*Nature is a nearer then tye the Law can or doth en-  
Vid. the Statute, and Title Parish.*

### *Presentment.*

A Presentment taken before Commissioners of Sewers was quashed, because 1. it did not appear in the Presentment by what authority the Commissioners did sit that took the Presentment, and so it might be *coram non iudice*. And 2. because it did not appear that any of the Commissioners before whom the Presentment was taken, were of the Quorum. Hill. 1649. B. S. *As is directed by the Statute that gives them their Authority.*

### *Parliament.*

The Parliament is not accounted to begin until the first day of the sitting thereof, and thence it is called the first Session of Parliament, although Writs are returned, and many adjournments may be before. Pasch. 1650. B. S. 21 Maii. *The Writs mentioned are meant the Writs directed to the Sheriffs of the severall Counties, and to the Cities and Burroughs, to Elect Members for them to serve in Parliament.*

### *Presidents.*

If there be a special cause to alter the ancient President of a writ, by reason of any new Statute or change in Government, the Curfitors are not to keep the old form, but are bound to alter it as the case requires, and if they shall refuse to do it, this Court will compel



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pel them to it. *Trin. 1650. B. S.* Else it would be very mischievous to the people, who by that means may have their Writs abated, and be put to the trouble and charge of purchasing of new Writs, by reason of their wilfulness or ignorance.

### *Prisoner and Prison.*

A Prisoner for Debt may be removed from the Fleet to the Kings Bench, and from thence to the Marshalsea for the same Debt. *Dyer 275.*

One that is imprisoned upon a *Capias utlagatum*, ought to be imprisoned as strictly as he that is in prison upon an Execution. *Trin. 1650. B. S. 3. Julii.* For he that refuseth to answer the Law, offends in as high (if not in a higher nature) then he that is condemned by the Law, and is to be punished as highly, because the publique is much concerned herein.

It is the course of the Court, when a Prisoner is delivered over by this Court unto the Marshal of the Court, to endorse the day of this delivery upon the back of the Writ, that it may be known when he was first committed to the Marshals custody. *Mich. 1650. B. r. 20. Nov.*

This Court may send for a Prisoner out of the Prison of the Marshalsea by rule of Court, without a *Habeas Corpus*, because that Prison doth belong to this Court, and they have the command of the Prisoners there in order to the execution of Justice, and the proceedings in that Court; but they cannot send for a Prisoner out of any other Prison, but by a Writ of *Habeas Corpus*. By Rolle Chief Justice. *Mich. 1650. B. S.* Because the ordinary

any power of this Court extends not unto other Prisoners and Prisoners.

*Possession.*

If one do make an Entry into the Lands of another, and that other doth notwithstanding the Entry, keep the Possession of the Lands entred into with his servants and cattel, the entry is no entry in Law, because the party in possession was not ousted by such an entry; but if the servants and cattel be put out to gain the possession, he that is put thus out of possession, if he will prove a possession in himself after this, he must prove an actual re-entry afterward. *Pasc. 1650. B. S.*

*Ap. To regain the Possession.*

The proving of ones cattel, to be upon the Land in question, is not a sufficient proof, that he whose cattel they were, was in possession of the Land at that time when the cattel were there, *Pasc. 1650. B. S.* *the cattel might be upon the Land Dammage feaut, and the Land at the time be in the Possession of another.*

*Peremptory.*

By the rules of the Court a Peremptory day to shew cause why the judgment should not be affirmed, is not to be given to the Defendant upon a Writ of Error brought to reverse a Judgment given against him, upon a *non sum informatus*, at the first reading of the record; but the Court will appoint a day to hear Counsel, for such a judgment is not so much favoured as a judgment upon a Verdict. *Mich. 22. Car. B. r.*

If

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If the Defendant do tender an issue in abatement of the Writ, and the Plaintiff doth Demur upon the issue, and upon arguing of the Demurrer, the issue is over-ruled, that is, is adjudged by the Court to be no good issue ; the Defendant is only to answer over, that is, to tender a better issue, for the over-ruling of the former was not Peremptory to him, to be concluded upon the merits of the cause ; for that never came in dispute. *Trin. 24. Car. B. r. But otherwise it is where such an issue and demurrer, is in bar of the Action, for there the merits of the cause is put upon it, but in the former the validity of the Writ is only in question, and whether the Defendant is thereby compellable to plead to the Plaintiff or not.*

If a Peremptory be put off by the Court, the party that will take advantage by the putting of it off, ought to enter the rule of Court that was made for the putting of it off. *Trin. 1651. B. S. A Peremptory is when a business is by a rule of Court to be spoken unto at a precise day, and if it cannot be spoken unto there by reason of other businesses of the Court ; the Court in such cases doth use at the prayer of the party, who is concerned, to dispense with the not speaking to it at that time, and doth give the party further time to speak in it without prejudice to him, and this is called the putting off of a Peremptory ; and this is used to be moved by Counsel at the rising of the Court, and is granted of course.*

### *Proclamation.*

At the latter end of the Assizes, there useth to be Proclamation made, that no more records of *nisi prius* be put in to be tried at that Assizes after such Pro-

clamation made, and that they shall not be received  
after, and all persons that are to attend their tryals, if  
the Records of *nisi prius* to be tryed be not then put  
in, may depart, and are bound to give no longer atten-  
dance at that Assizes. *Pasc. 1652. B.S. This is done when*  
*the Court perceive there are as many Records put in as*  
*can conveniently be tryed at that Assizes, and that the*  
*people concerned might not attend upon their causes in*  
*vain.*

*Protection.*

The Protection of the Court of the Kings Bench  
was granted to Protect a Witness that was to give  
Evidence against a Prisoner for the late Protector,  
upon an Endictment of High Treason. *Note.*

In the Case of one *vers. Bright. Trin.*  
1658. It was said by Glyn Chief Justice. That if  
one be out-lawed, this Court will not Protect him from  
being taken upon the Out-lawry, in coming and going  
from the Court, if it be upon business which concerns  
not that Out-lawry; for it is no reason that he that  
stands out in contempt of the Law should have any Pro-  
tection by it.

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*Quashing*

*Quashing of Endicements, Orders, &c.*

**T**HIS Court hath authority to Quash Orders of Sessions, Presentments, Endicements, &c. made in inferior Courts, or before Justices of the Peace or other Commissioners, if there be cause, that is, if they be defective in matter or form. *Mich. 22. Car. B. r.* To Quash comes of the French word Quasser, or rather Casser, which signifies to break in pieces, to cancel, destroy, make null or void. But this Quashing is but by favour of the Court : for the Court is not tyed Ex Officio to do it, but may leave the party to plead unto them, and to take advantage of the insufficiency of them by pleading to them, as in many cases they use to do, although they know the Endicements to be insufficient, viz. where the Endicement is for some offence much prejudicial to the Common-wealth.

In the Case of *Wells and Wells. Hill. 1658.* It was said by Glyn Chief Justice, That a Sberiff that makes an ill return cannot move to quash it, though it was made upon a mistake, but must make a better, or else be is to be amierced.

An Endicement may be Quashed for false Latine, or for having in it insensible words, or English words, or for defect in the form of it. *Trin. 23. Car. B. r.*

The Court will not Quash an Endicement of forcible entry after a Verdict found upon the Endicement against the Defendant, before hearing of both the parties concerned in the Cause. *Mich. 23. Car. B. r.* For the Court hath regard to Verdicts, and will not make them fruitless without very good cause shewn.

The Court will not Quash an information for a fault

fault in the body of it, but will leave the Defendant to demur unto it, if he believe it to be insufficient; but it is otherwise of an Endictment. *Pasc.* 1650. B. S. 24 *Maii.* *Quere rationem.* It seems it is because informations are usually preferred for greater offences than Endictments, and upon more solemn advice.

*Quo Warranto.*

A *Quo Warranto* was brought for vexation, upon forty eight points, and the Court being moved in it, did order that the prosecutor should wave that *Quo Warranto*, and should bring a new one, and therein insist only upon three points, but that he might proceed to a tryal upon it, his new *Quo Warranto*, in such time as he might have done upon the old. *Hill.* 22. Car. B. r. To the end he might not be delayed in his proceedings by bringing of the new *Quo Warranto*.

*Quere.*

Whether one that is under an Arrest may make an Obligation to the Plaintiff at whose sute he was Arrested, for his appearance to his Action. *Pasc.* 24. Car. B. r. *Pasc.* 1648. B. S. In *Leach and Davies Case.* It seems because if the Bond should be sued, he may plead it was made by address, because he was under restraint when it was made.

If a Lessee for years cut down Timber upon the Land lett unto him, and carry it away from off the ground, the Lessor may well bring an Action of Trover and Conversion, for the Timber. *Mich.* 24. Car. B. r. Because immediately upon the severance from the Free-hold, the Law casts the property in the Lessor, which is



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*is called a general property; but whilst it stood the Lessee had a special property for shadow and masts, &c. for his cattel; which being cut down, his special property is gone, and only the general property left.*

Whether a fine levied of Land shall extend to a contingent use of that Land. *Mich. 24. Car. B. r. In Thomas and Kemishes Case. It seems not, for the uncertainty of the hapning of it.*

It there be two Tenants in common of Land, and one of them dye. *Quære. How his wife shall be endowed of the Land which her husband held in common, whether by metes and bounds or not. 16 Nov. 1650. B. S.*

### *Return of Writs, &c.*

**T**He Court was moved, that a return made upon a *Habeas Corpus* might be amended before it was filed, and it was granted. *Hill. 21. Car. B. r. But after it is filed it cannot be amended, for then it is a Record of the Court.*

If a special *Scire Facias* do issue forth, a *nihil* cannot be returned upon this *Scire Facias*. *Hill. 21. Car. B. r. For a nihil is a general return, which ought not to be in this case; because the Writ is a special Writ, for the return must answer the Writ.*

If an inferior Court do make an ill return of a *Habeas corpus*, the Court will grant an *alias Habeas corpus*, and also set an amercement upon them for making an ill return of the former *Habeas corpus*. *Hill. 21. Car. B. r. Because thereby, viz. by the ill return, Justice is delayed, and the party grieved is also put to more trouble and charge to obtain the alias Habeas Corpus.*

If a Writ out of this Court be directed to an inferior Court, which the inferior Court is not bound to allow, but may proceed notwithstanding the Writ unto them, yet they ought to make a Return upon the Writ, and in the Return to shew the cause, why they do not allow the Writ, but do proceed in the Cause, notwithstanding the Writ. *Hill. 22. Car. 1. For the Writs of this Court are to be obeyed, if there be not very good reason shewed to the contrary why they ought not to be obeyed, and therefore there must be Return made, else the Court will suppose their authority is slighted.*

A Prisoner brought to the Bar, upon the Return of his *Habeas Corpus* may have a Copy of the Return, if he pray it, that he may take his exceptions to the Return. *Mich. 22. Car. B. r. But the Return must be first filed, for before it be filed it is not a Record of the Court, and it may be amended.*

If the Under-Sheriff of a County may be justly challenged, as partial to the Plaintiff, or the Defendant in respect of kindred or alliance, or some other cause that may render him not to be indifferent between the parties; and he be to execute a *Venire Facias*, to summon a Jury to try an issue joyned betwixt the Plaintiff and Defendant, in such cases the Court will upon motion of the party that is likely to be prejudiced if a Jury should be returned by him, order that the High Sheriff of the County shall himself Return the Jury. *Mich. 22. Car. B. r. But via versa, they will not do it, but direct the Coroner to do it.*

If one be Arrested by the Sheriffs Bailiff, and a Bond given unto the Sheriff, that the party Arrested shall appear at the Return of the Writ; the Sheriff ought not to Return a *Non est inventus*, but a *Cepi*

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*Corpus*, and if he do Return a *Non est inventus*, the Plaintiff may bring an Action upon the Case against the Sheriff for making a false Return, or else the Court may amerce him for it; and if the Sheriff do Return a *Cepi corpus*, and yet the party Arrested doth not appear at the day, the Court will encrease amercements upon the Sheriff, until he make the party to appear. *Hill. 22. Car. B. r.* For when the party is Arrested, he is in custody of the Sheriff, and he ought to keep him at his peril, and bring him in at the day, and it is of favour to the party that he takes Bond of him for his appearance, for he is not bound to do it, and if he suffer by it, he may take his remedy against the party upon the Bond.

It is not requisite that the Sheriff in making a Return should insert his title or name of dignity, or Christian, or surname, but only by his name of office, for of that the Law takes notice. *Hill. 22. Car. B. r.* If he do insert those names, which is usually done, the Return is not thereby hurt or made defective, for it shall be accounted a Surplusage only.

If the Sheriff Return a *Cepi corpus*, and the party Arrested is sick and doth not appear, there may in some cases a *Habeas Corpus licet languidus*, issue out of this Court to bring the party in, notwithstanding his sickness. *Hill. 22. Car. B. r.* So that in some cases the party is not excused from obeying the Law, though the hand of God be upon him; for the Law regards publick Justice more then the private good and welfare of any particular person, yea of many particular persons although it be also tender of the persons of all.

If a *Capias ad satisfaciendum*, be awarded, and the party dye before the Return of it, it may be avoided by pleading, and his Bail shall be discharged. *Hill. 22. Car. B. r. Q.*

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If a Writ be returned by a person to whom it was directed, the Return is not good. *Hill. 22. Car. 1.* For Processes of Law are to be executed by such persons only, as the Law directs them to, and takes notice of, as publick Ministers who are accountable for their actions, and not by private persons.

A Return of the Sheriff ought not to mention the year of the Age of the King, but the year of the reign of the King. *Pasc. 24. Car. B. r.* For the Sheriffs and all Ministers of Justice are Officers to the King as Head of the Common-wealth in his politick capacity, and not in his natural capacity as a Man, but as he is a King, which relates to the time he began to reign, and not to the time of his birth.

Where a matter to be tryed by a Jury doth concern the title or interest of the Under-Sheriff, there the party that is to try this matter, is to be returned by the High-Sheriff, and not the Under-Sheriff. *Trin. 24. Car. B. r.* For it is to be presumed that the Under-Sheriff will not Return an indifferent Jury, where himself is concerned, for every one is apt to be partial for his own benefit. *Vid. 275.*

It is not necessary for the Sheriff to Return the names of the Juries names, but to say generally that they are *de vicineto* of such a place, for so it shall be intended, and the form of all Returns of Juries are the same. *Trin. 24. Car. B. r.* And old forms are to be observed and not varied from, but upon special reasons.

It is not necessary that the Return of a *Habeas Corpus*, or a Return made by Commissioners of Sewers, should be so formal and punctual, as a Plea ought to be. *Mich. 24. Car. B. r. Mich. 1649.* For there is not so much prejudice to any one by their informality

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as may be by informal and ill pleading, neither are such Returns made by so learned men as pleadings are, and therefore the Court expects not, they should be so curious in framing of them, but will accept of them for good, if they be good in the substance of them, and to a common intent.

A Return of a *Habeas corpus* ought to be written in Parchment and not in Paper; and if it be made in Paper it is not good, nor will the Court accept of it. Mich. 24. Car. B. r. Pasc. 1650. For the Return is to be filed, and made a Record of the Court, and all Records are to be in Parchment, that they may continue to posterity, which they will not so well do, if they were written in Paper.

If a *Habeas corpus cum causa*, that is, a *Habeas corpus* to remove the body of the party, and of his cause depending, be directed to an inferior Court, they ought to Return the body and all the causes that are there depending against him at that time, and it is not sufficient to return one or some of the causes only. Mich. 24. Car. B. r. For the word *causa* is there taken for nomen collectivum, comprehending more than one; for all the causes make but one as to detaining the party in Prison.

In criminal matters, proceedings which are erroneous, are not helped after a Verdict, by the Statute of Jeofails. Pasc. 1651. B. S. 11 Mii. This is in favour of the life and liberty of the people which are most concerned in such proceedings, and are much favoured in Law, and the Statute extends not to them. See the Statutes.



*Record.*

In the Case of *Dallington, vers. Shepheard.* Trin. 1657. In a *Writ of Error.* By Glyn Chief Justice. If after a *reversetur* nisi be pronounced by the Court, the Record be amended, the Record ought to be read again and opened before it can be a Concilium; and this was so done in this Case, by Twifden of Council for the *Writ of Error.*

If a Record come once into the Kings Bench, it never goes out again. 18 Ed. 4. 6. 29. *Aff.* 52.

A *Habeas corpus* is not a Record, until it is returned and filed, and then it cannot be amended, but before it be filed, it may. *Hill.* 21. *Car. B. r.* Vide antea.

If the writing or form of a Letter in a Record be doubtful, so that it may be taken either for one Letter or another Letter, the Court will construe it to stand for that Letter, that is, for the maintaining and upholding of the Record, and not for that Letter which will go to the making of the Record erroneous and naught, *ut res magis valeat quam pereat.* *Hill.* 21. *Car. B. r.* For the Law doth delight to maintain the reality and being of things, and favours not the destruction and nullifying of them, and therefore if a Record be so penned, that the words may receive a double construction, one to make the Record good, and another to make it erroneous, the Court will interpret the words that way, that will make the Record good, and not that way which will make it erroneous, for such interpretation is more for the advancement of justice.

A matter of Record must be proved by the Record it self, and not by evidence; for no issue can be



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joyned upon it to be tryed by a Jury, as it is of matters of fact. 21. Car. B. r. For the credit of a Record is greater then any testimony of Witnesses ; but if the Jury do know there was such a Record, they may find it though it be not produced.

A Record certified out of an inferior Court, upon a Writ of Error brought, is not said to be in this Court to be proceeded upon before it be entred here, or be in the Office, although it be shewed there. 21 Car. B. r. For before that the Court is not possessed of the Cause.

A Record ought to be pleaded intire, that is, the whole Record, and not part of it, with an *inter alia*, in reference to the Record, and so ought a special Verdict to find a Record. Mich. 22. Car. B. r. For part of a Record taken by it self, is not the Record, for a Record cannot be taken by parcels, because it is an entire thing.

This Court will not amend a Record which is moved out of an inferior Court ; but they will amend a Record which is removed hither out of the Common Pleas, if they see cause, and so they will do Records removed out of the County Palatine of Chester, and some other Courts sometimes. Mich. 22. Car. B. r. Because they take less notice of the proceedings in inferior Courts, then of the proceedings of the Common Pleas, and of the County Palatine and some other Courts of a higher nature then ordinary inferior Courts.

Pasc. 1659. The Court ordered a Record to be amended, after a Demurrer to the Record was discontinued, for then it was as if no Demurrer had been.

The Court will not supply a blank left in a Record to make it perfect, whereas before it was defective.

Active. *Mich. 22. Car. B. r.* For this were for the Court to make a Record, which is not their Office to do, but to Judge of them, and by so doing the party that might take advantage of the defect of the Record, would thereby be deprived of it, which the Court will be no cause of.

If the Record of the issue made up ready for the tryal of the Cause be defective in some small thing which may be well amended without defacing of the Record; the Court upon a motion will give the party leave to amend the Record, if he will pay costs to the Defendant; although it be entred for tryal: but the Court will not give leave to amend it if it cannot be done without defacing and much altering of the Record. *Mich. 22. Car. B. r.* For the Records ought to be plain and fairly written, that there may no question arise how they are to be read.

The Court will not make application of a Record produced to the matter for which it was produced for the benefit of the party that doth produce it, but the party himself and his Council must do it. *Pasc. 23. Car. B. r.* For if the Court should do it, it would be for them to act the part of Counsellors, and not of Judges, which they ought not to do.

A transcript of a Record, which Record was amended in the Common Pleas, may by leave of this Court be amended here by a Clerk of this Court, but without leave of the Court, nor out of the Court it may not be done. *Pasc. 23. Car. B. r.* For a Record cannot be amended without a rule of the Court grounded upon motion, for that is called the leave of the Court, for the Court speaks by their rules.

The Judges cannot judge of a Record given in evidence, if the Record be not *sub pede sigilli*, that is,

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exemplified under seal, but a Jury may find a Record, although it be not so, if they have other matter given them in evidence sufficient to induce them to believe that there was such a Record. *Pasc. 23. Car. B. r.* *For the Judges are to judge only de existentibus & apparentibus, but the Jury are induced in their Consciences by things given in Evidence, which are but probable, for the most part, and accordingly they give their Verdict.*

If a Record be removed into this Court by a Writ of Error, and the Defendants Counsel in the Writ of Error, do not open the Record right as it is, unto the Court, this false opening of it shall not be prejudicial to the Plaintiff in the Writ of Error, but he may examine the Record afterwards, and rectifie the misrecitals. *Trin. 23. Car. B. r.* *And in such cases the Court will have the Record openly read, that they may judge of it.*

A Record may be contradictory in appearance, and yet may in some case be nevertheless a good Record. *Trin. 23. Car. B. r.* *For the Law more respects the reality of things then outward appearances.*

A Record that is razed, remains a good Record notwithstanding the rasure in it, yet he that razed it, is not to go unpunished for his offence. *Mich. 16. 9. Q. What rasure is meant ?*

Apparent faults and misprisions of the Clerk only, in Records removed out of inferior Courts into this Court, are amendable here by the Statute of 8. *H. 6. Trin. 23. Car. B. r.* *But not other faults or errors in them. Vid. Stat.*

Neither a Deed enrolled, or a Decree in Chancery enrolled, are Records, but it is a Deed and a Decree Recorded. *Mich. 23. Car. B. r.* *For a Record of a*

*Cont.*

*Court is made up of the proceeding in some cause proceeded in, in that Court; and there is difference in, betwixt a Record and a thing Recorded, for though every Record be a thing Recorded, yet every thing Recorded is not a Record.*

When a Record is to be spoken unto in Court, the Counsel at the Bar ought to open the effect of the Record before it is to be read by the Clerk in Court, by the custom of practice; yet the Court may suffer it to be first read if they please. *Hill. 23. Car. B.r.*

There was a rule of Court made, that every Attorney of the Court shall enter the whole Record upon the Roll, after a Tryal had in the cause, before the next Term after the Tryal so had, upon the pain of twenty shillings to be paid by every such Attorney that shall not do it, towards the relief of the poor. *Hill. 1649. B. S. That the Record may be spoken to the next Term after the Tryal, if there be cause, which cannot be done until the Record be perfected, and so by this the not perfecting it, the Clyent is delayed. Q. Whether it was taken notice of and entred.*

A Record cannot be removed by a Writ of Error, until the Judgment in that Record be entred. *Pasc. 1650. B. S. 12. Maii. For till then the Record is not perfected.*

By Rolle Chief Justice, it was the ancient custom to enter the Record of the Cause before the Cause was carried down to the Assizes to be tryed; but this course was found to be inconvenient, because it could not be amended after the entry of it, and therefore now they use not to enter the cause before the tryal be past, and therefore he ordered a rule to be set up in the Office, that if the tryal do not proceed at the Assizes, at which the Record was carried down

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down to be tryed, and the Plaintiff will carry it  
down again, that he give the Defendant new notice  
of the tryal, and so likewise is the Defendant to do  
where he intends to try the cause by Proviso, that  
the adverse party may not attend with his Counsel  
and Witnesses to no purpose. *Trin. 1651. B. S. Q.*  
*Whether this was done accordingly.*

### *Relief.*

A Relief is the fruit of a Rent-service. *Hill. 21.*  
*Car. B. r. And it is two-fold; that is to say, 1. A*  
*Relief at the common Law; And 2. a Relief grounded*  
*upon a custom.*

### *Rescous.*

An Endictment for a Rescous returned against one  
into this Court, ought not to be quashed, although it  
be erroneous, except the party that is endicted for it  
do appear personally in Court. *21 Car. B. r. For he*  
*cannot in such a case appear by Attorney, because the*  
*offence was criminal and personal, for which he must*  
*answer in person.*

An Endictment of Rescous ought to express the  
place where, and the time when the Rescous was  
made, or else it is not good for the uncertainty of it.  
*Trin. 23. Car. B. r. So that the Defendant cannot tell*  
*what answer to make for himself, in respect of the un-*  
*certainty of the time and place, when and where the of-*  
*fence was committed.*

An Endictment of one that was Endicted for a  
Rescous, supposed to be made in the fifteenth year of  
King *Charles*, was quashed for its insufficiency, and  
yet



the Relcoufer did not appear personally in Court (contrary to the common rule observed in such cases) the cause thereof seems to be, because it was an old indictment, and no proceedings had been made upon it against the party. *Pasc. 24. Car. B. r.*

*Request.*

Where one is to do a Collateral thing, he ought to be requested to do it, but where the thing to be done, is a part of the contract, there needs no Request to be made to the party to do it. *21 Car. B. r.* For by the contract he hath taken notice at his peril to do it; but it is not so of a Collateral thing agreed to be done upon making of the contract.

Where one brings an Action of Covenant for not paying of moneys according to a Covenant, he needs not alledge, that he Requested the Defendant to pay them; but where he brings an Action of Debt for money due by Covenant, he ought to alledge a Request. *Trin. 23. Car. B. r. Q. Differentiam, Whether it be, that in the former case the Plaintiff is but to recover what he is damnified by not performing the Covenant, and in the latter he is to recover the whole money Covenanted to be paid.*

Where one is bound to make a special Request for the doing of a thing, a general *licet sapius requisitus* in the Declaration is not sufficient. *Trin. 24. Car. B. r.* For those words are too general, and meer matter of form, and in a special request ought to set forth the time and place, and manner of the Request made.

In



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In an Action of Debt brought for monies due upon an Obligation, it is not necessary to alledge a Request. *Trin. 24. Car. B. r.* For the very bringing of the Action is a demand of the money in Judgment of the Law; and the party was bound by his own Deed to pay the money at his peril, without being demanded it.

One may make a Request by Attorney for the payment of monies due upon an Obligation. *Mich. 24. Car. B. r.* Though he need make no request at all, for the request is not prejudicial to anybody.

Upon a Contract in the nature of a Debt, Request or no Request is not material, but it is otherwise if the Contract be a special Contract for a Collateral thing. *Mich. 1650. B. S.*

### *Repeal.*

The Defendant cannot Repeal his Warrant of Attorney given to an Attorney to appear for him; but he is compellable to appear by his Attorney according to his Warrant by the rules of the Court, that he may not delay his appearance by that means to the prejudice of the Plaintiff. *Trin. 22. Car. B. r. Q.* Whether he may not repeal his Warrant, so that he will appear by another Attorney.

### *Reversal,*

The Chief Justice or the ancientest Judge in the Court in his absence, doth always pronounce the reversal of an erroneous judgment to be Reversed by

by a Writ of Error openly in Court, upon the prayer of the party, and he pronounceth it in French, to this effect, *Pur les errors avandit, & auters errors manifest in les record, soyt les judgement reverse, & le Defendant restore, a tout ceo que il ad per ceo perdu* in English thus. For the aforesaid errors, and other manifest errors in the Record, let the Judgment be Reversed, and the Defendant restored to all that which he hath lost by it. *Trin. 22. Car. B. r.*

The Reversal of a Judgment may be pronounced conditionally, that is, that the Judgment is Reversed, if the defendant in the Writ of Error do not shew cause to the contrary at an appointed time. *Trin. 22. Car. B. r. This is called a reverletur nisi.*

Where divers persons stand Out-lawed for a forcible entry, if the Out-lawry be erroneous, it may be Reversed as to one of the persons Out-lawed, and yet stand good as to the others, for the Out-lawries are several, but the possession of the Land cannot be restored until the Out-lawry be Reversed in the whole. *Hill. 22. Car. B. r. Because the force is not wholly purged.*

The Judge will not pronounce the Reversal of an erroneous Judgment, though it be adjudged to be erroneous, except the Council for the Plaintiff in the Writ of Error do pray it may be pronounced. *Hill. 1649. B. S. 30 Jan. For the Judges are only to do justice to those that desire it, for their Office is to judge between party and party.*

*Restitution*

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## *Restitution and Rerestitution.*

No Restitution is to be granted by the Court, upon a suggestion of the insufficiency of an Endicement of forcible entry or other matter, until the *Certiorari* granted to remove the Endicement into this Court be returned and filed. *Mich. 22. Car. B. r. For before the return and filing of it, the Court hath nothing before them upon record to judge upon.*

Where an Endicement of forcible entry is quashed, the Court upon motion, doth usually grant the party Endicted, a Writ of *Rerestitution*, to restore him to the possession of the Land : yet the Court may (if they please) settle the possession of the Land in question, according to their own discretions : viz. where they shall conceive the most right to be for the possession. *Mich. 22. Car. B. r. And they do usually make Rules accordingly.*

There ought to be no Restitution or Rerestitution granted of the possession of Lands, where it cannot be grounded upon some matter of Record. *Hill. 22. Car. B. r. Appearing to the Court.*

A Writ of Restitution lyes, to restore one to the place of one of the Common Council of London, or to the place of a Constable, if he be illegally put out of such a place. *Trin. 22. Car. B. r. Or to a Church-wardens place, or to a Recorders or Town-Clerks place, and generally to any publick Office, or place of profit, dignity, or trust, but not to a private Office or place, which concerns not the Common-wealth ; but there the party injured is put to his Action at Law for the recovery thereof.*

The words *remisit* and *relaxavit*, expressed in a Charter of pardon, granted by the King unto one for felony committed by him, do not restore him unto his goods, which he forfeited unto the King by being convicted of the felony: but there ought to be the word *restituit*, which doth properly and in its genuine signification, import a Restitution to a thing which he formerly had, but then hath not: whereas the words *remisit* & *relaxavit*, doth properly signifie the remitting or releasing of the claim which one hath to a thing, which is in his possession to whom the release is made. *Trin. 23. Car. B. r. Vide Title Pardon.*

The proper nature of a Writ of Restitution is, to restore the party that hath it, unto the possession of free-hold or other matter of profit. *Trin. 23. Car. B. r. Yet this doth not generally hold, for one may have a Writ of Restitution, in some Cases, to be restored to a place of no profit, as is before expressed, viz. to an office of dignity or publick trust.*

The Law doth oftentimes restore the possession to one without a Writ of Restitution: to wit, by a Writ of *Habere facias possessionem*, and otherways, in a common course and proceedings of justice. *Trin. 23. Car. B. r. Upon a Tryal at Law.*

A Writ of Restitution, is not properly to be granted, but in such Cases where the party cannot be restored by an ordinary way of justice or course of law, and many times such Cases do happen. *Trin. 23. Car. B. r. For where ordinary Remedies may be had, extraordinary are not to be resorted unto.*

If one be Endicted for a forcible entry, and the party Endicted do traverse the Endictment, he cannot have restitution granted unto him, before a Tryal, and

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and a Verdict, and judgment also given for him, although the Endictment be erroneous. *Mich. 23. Car. B. r. Mich. 24. Car. B. r.* For it is too late to move to quash the Endictment after he hath taken his traverse, and so the Endictment must stand good against him till the Tryal, until the right be determined in an ordinary way of tryal, which he hath by his Traverse put himself upon.

The Justices of Peace only before whom an Endictment of forcible entry is found, must give the party Restitution who was put out of possession by force, for they have best conuance of the matter, and not other Justices of Peace of the County : but the Judges of this Court may grant a Writ of Restitution, though the Endictment was not found before them. *Hill. 23. Car. B. r.* For they have a superintendent power over all England, and have power to examine the form in Court, and to make rules accordingly to justice in the Cause, viz. If the Endictment be removed into this Court.

Where a Judgment for Land is reversed in this Court by a Writ of Error, the Court may grant a Writ of Restitution to the Sheriff, to put the party in possession of the Land recovered from him by the erroneous judgment. *Pasc. 23. Car. B. r.* For part of the reversal of an erroneous judgment is, that the party against whom the judgment was given, be restored to all that he hath lost by the judgment ; which is to be done by the Sheriff, who put him out of possession by virtue of the habere facias possessionem, directed to him upon the erroneous judgment.

There may a Writ of Restitution be granted to one that stands endicted for a forcible entry, after he hath Traversed the Endictment, and before the Tryal, which



There do appear to be apparent delay in the proceeding of the Defendant upon the traverse, else not, as is foresaid. *Trin. 24. Car. B. r.* And if it should not so, it might prove mischievous to the party concerned.

There cannot be a Writ of Rerestitution granted, where there doth not appear to have been a Writ of Restitution formerly granted in the Case. *Mich. 1650. S.* For the very word Rerestitution doth imply, that there was a Writ of Restitution formerly granted, and a wronging of the Party since the Writ of Restitution executed.

A Writ of Rerestitution may be granted upon a motion for it, if the Court see cause to grant it. By *Justice. Pasc. 1650. B. S. 2. Maii.* And how much rather may it be proceeded in this way, if it may be.

*Q.* Upon an indictment of forcible entry found against a party, if he do neither traverse nor plead to the indictment, the party put out of possession may be restored to his possession without moving the Court. *1650. B. S. 22. Maii. Q. By whom.*

*Rule.*

If a Rule of Court be made betwixt parties by their Consent, although the Court would not have made such Rule without their Consent, yet if either party refuse to obey such a Rule made, the Court will on motion grant an Attachment against the party that disobeys the Rule for other party if he desire it; this disobeying the Rule is a trifling with the Court and a Contempt to the authority thereof, to which by their Consent they submitted themselves.



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In a Case between Middleton Plaintiff, and Sir John Lenthall Defendant, upon a Rule made by their Consents that Sir John Lenthall should Seal a Release of Errors upon a Judgment. Hill. 1655. Jan. 23. B. S.

The Court will not make a Rule for a thing which may be done by the ordinary course of the Court and if the Court be informed that they have made such a Rule, they will vacate it. Mich. 22. Car. Bar. For the Court is not to be troubled with needless motions, and to do impertinent and useless things, for this is not for the honour of the Court, and it doth put the Clients to needless trouble and charge.

The Attorneys are bound to observe the Rules of the Court, for if they should not, other Attorneys would not know what to do in their Clients Cause nor the Judges how to judge of the legality or illegality of the proceedings in Causes. Mich. 22. Car. Bar. For to proceed in any thing without a Rule, is to walk in the dark, and tends to bring things to confusion and it is a Contempt to the Court, to disobey the Rules of it.

If the Court do make a Rule which was grounded upon an Affidavit, he that will move the Court against this Rule, must bring in the Affidavit in Court upon which the Rule was made. Mich. 22. Car. Bar. That the Affidavit may be read in Court, to put the Court in mind for what reasons they made the Rule, and whether there be stronger reasons to vacate it, then there was for the making it, or not, which without the Affidavit cannot be done.

The Plaintiff and Defendant are both bound, under their perill, to take notice of the Rules made by the Court touching the Cause depending between them.

lls 22. Car. B. r. Except part of the Rule be, that the party shall give notice to the other of the Rule made against him, and then are they not bound to take notice of it without notice given of them.

The Court ought not to give a Rule to any Prisoner in the Kings Bench Prison, to go at large, except such a prisoner have suits in Law of his own depending, at the time of the Rule made. *Pasc. 23. Car.* And in such a case it is usual to give him leave so as to sollicite his causes only.

If there be divers Rules of Court made in a Cause, and one of the parties intends to move the Court upon a Rule formerly made, he ought also to show the last Rule made in the Cause. *Pasc. 23. Car. B. r.* Else the Court cannot understand how far the Cause has been proceeded in, nor how it stands in Court upon the whole matter.

The Court will make such a Rule, by the consent of both the parties, which without their consent they could not have made. *Pasc. 23. Car. B. r. For, Con-  
tra partium tollit errorem, and neither party hath  
cause to complain, for volenti non fit injuria.*

The Court will not make a Rule for a prisoner that is not imprisoned in the Kings Bench Prison. *Pasc. 23.* For that only is the prison which properly belongs to this Court, and of which this Court hath jurisdiction, and cognisance of the causes of the prisoners there.

Any prisoner in the Kings Bench Prison may move for a Rule of Court, every day to go at large, if the prisoner hath business in Law of his own to follow: but such Rules do only extend to give him leave to go and to instruct his Counsel, and not for him to go elsewhere at his pleasure. *Pasc. 23.*

*B. r. Though under colour of such Rules the pri-  
soners*

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soners do too often go at large upon other occasions than their Rules do give warrant for.

Rules of Court ought to be interpreted according to rule and order, and not incertainly. Mich. 23. Car. B. r. For were it otherwise, they would become snares intrap, and not Rules to order the proceedings of Clients.

One is not bound to take notice of a particular Rule of Court, except he have particular notice given him of the Rule. Pasc. 24. Car. B. r. Q. Tamm For it seems every one should be consant, how Court proceeds from time to time in his cause depends there, and the rather because the Court useth not to make any such Rule except the party against whom the Rule is made, had notice that the Court would be moved to grant such a Rule.

The Preignotaryes of the Common Pleas will make a Certificate to this Court of their proceedings there, without a Rule of this Court to enjoin them to do it. Trin. 24. Car. B. r. But then they are it for the better informing of this Court, and that course of Justice may not be interrupted or delayed for want of such a Certificate as the cause requires.

If a Rule of Court be made, and it is not drawn and Entred the same Term it is made, the Clerk will not draw it up afterwards until the Court be met again. Pasc. 1656. B. S.

Pasc. 1659. By Glyn Chief Justice. If Writing brought into the Court by Rule of Court, upon a petition the Court will make a Rule to deliver them, if there be occasion for them, but if they be brought by agreement of the parties in private, the Court

make no Rule in it, for without a Rule the Court is not  
satisfied of them.

A Rule made in a Judges Chamber must be entred  
in the Office, or else it is of no force to ground a  
motion upon. *Pasc. 1650. B. S. 10. Maii.* But then  
it is accounted the act of the Court.

If a prisoner have a day Rule, to permit him to go  
abroad, yet he ought not by vertue therof to go into  
the Country, except it be in case where he hath busi-  
ness in Law there, then depending in Court. *Mich.*  
*1650. B. S. 12. Nov.*

*Rejoynder.*

If the Defendant do in his Rejoynder depart from  
the Plea pleaded, in bar this Rejoynder is not good.  
*Mich. 22. Car. B. r.* For this is to say and unsay, which  
the Law doth not allow, for Pleas must be plain and  
main, and by the doing thereof the cause depending  
is hindered from coming to a certain issue.

One ought not to Rejoyn upon such words which  
are not contained in the Declaration or Replication.  
*Mich. 23. Car.* For that is for the party to frame a  
course of his own, and not to answer the Plaintiffs  
matter alledged, and so is to no purpose.

*Remainder.*

A contingent Remainder may be destroyed, by de-  
stroying the particular estate upon which it depends.  
*Mich. 22. Car. B. r.* For take away the foundation  
that supports the building, and the building must needs  
fall, and so it is in this case.

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A Remainder is a residue of a particular thing going before ; and yet in some case there may be a Remainder without a particular estate in esse to support it ; as it is in the Case of a Use in Remainder. *Hill 22. Car. B. r. But this is not by the Common Law, but by the Statute.*

*Residuum est ultima pars diversorum particularium Trin. 23. Car. B. r.*

### *Revocation.*

A Revocation of Letters of Administration may be without a seal, *Mich. 22. Car. B. r.* For it is but to signify the pleasure of the ordinary, touching the administration of the goods of the intestate ; but the Letters of Administration must be under seal, because thereby the administrator derives his authority, which ought to be fortified as well as may be ; and without such Letters of Administration the Law takes no notice of him as an administrator.

If an Attorney appear for his Clyent, and accept of a Declaration, the Clyent cannot revoke his warrant of Attorney, with an intent to stay the Plaintiffs proceedings, *Mich. 24. Car. B. r.* But the Court will force the Defendant to plead, and if he do not plead will order that judgment be entered against him for not pleading, but he may change his Attorney so he pleads in due time, and plead by another Attorney in due time.

### *Ryot.*

If divers persons do assemble together in a peaceable manner, and after they are so assembled, do a

the Ryotous act, this is a Ryotous assembling of  
them, although they did not assemble at the first in  
ryotous manner, but peaceably. *Hill. 24. Car. B. r.*  
the ryotous act shall have relation to their assembling  
together, so far as to construe it to be with a  
ryotous intent, although it did not appear so as the  
act, for the intentions of parties are best interpreted  
by their actions.

Two persons alone cannot make a Ryot, but  
there must be three persons together at the least  
to make a Ryot. *Q. 22. Car. B. r.* But two persons  
may make a conspiracy, as well as a greater number.

*Recognisance.*

A Recognisance entred into in the Common Pleas,  
entred specially; but a Recognisance entred in  
this Court, is entred generally. *Pasc. 23. Car.*  
Yet both ways are good, for the entry makes it  
a Recognisance, but the act of the party that did ac-  
knowledge it.

*Roll.*

The Plea Roll is of more credit and esteem in the  
Court than the Essoign Roll, for the Plea Roll is the  
Roll of the Court. *Pasc. 23. Car. B. r.* And upon Re-  
cord there.

If a Writ of Error be brought to reverse a Judg-  
ment, it is not necessary to mark the Roll; yet if it  
be not marked, that thereby the Attorney on the o-  
ther side may take notice of the bringing of the Writ  
of Error, nor the Attorney on the other side, hath  
notice given him of the bringing of the Writ of Er-



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ror, if he do proceed and take out execution upon the Judgment, it is no contempt to the Court. Mich. 1649. B. S. For it shall not be presumed he knew there was a Writ of Error brought: yet though it be no contempt in him to take out the Execution, yet the Execution shall be superseded, quia improvidè emanavit, for by bringing of the Writ of Error, the hands of the Court where the judgment was given, were foreclosed from proceeding any further; and so it was improvidently done for them to grant out Execution after the Writ of Error brought and allowed.

### *Replevin.*

A Replevin ought to be certain, in setting forth the number and kinds of the Cattel distrained, or else it is not good; because if it be incertain, the Sheriff cannot tell how to make deliverance of the Cattel, if a Writ be directed to him for that purpose, because he knows not particularly what the Cattel were that were distrained, which ought to have bin expressly mentioned to that intent in the Replevin. Trin. 23. Car. B. r.

### *Replication.*

If the Plaintiff do Reply to a Plea in Bar, which is not good by his replying to it, he hath confessed it to be good. Trin. 23. Car. B. r. And so it shall be now taken to be, for he hath lost his advantage of demurring unto it, by passing by the defects of it, and replying unto it, and the Court will suppose he intended not to take advantage of the insufficiency of the Plea, but to proceed to an issue upon the merits of his cause.

If an Action for the breach of the condition of an Obligation be brought, and the Defendant do plead that he hath performed the condition, the Plaintiff in his Replication must show in what particularly the Defendant hath broken this condition. *Pasc. 24. Car. B. r.* That the Defendant may be able to give a particular answer to the breach assigned; and if he do not assign a particular breach, his Replication is idle, for it says no more then what was formerly said in the Declaration, viz. generally, that the Condition is broken, which the Defendant in his plea denies, and therefore if the Plaintiff will not joyn Issue upon the Defendants plea, but will reply, he must there show how the Condition is broken, and then he puts the Defendant to a new answer.

#### *Reservation.*

If the Lessee for years, assign over all his term to another, and reserve a Rent, the Reservation is void. *Pasc. 24. Car. B. r.* For by the assignment of the whole term, he hath no interest in the thing left, for the which he can challenge any Rent to be due, and the Rent must be due for some interest that the Assigner hath left in him in the thing Assigned, notwithstanding the Assignment which cannot be here, because he hath ousted himself or the whole, and so there is no privilege betwixt him and the Assignee.

#### *Recovery.*

A Recovery cannot destroy a thing executory which doth depend upon a contingency. *Pasc. 24. Car. B. r.* Because it was uncertain at the time of the

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*the Recovery suffered whether it would ever be or no, and a Recovery cannot work upon so remote and uncertain an estate.*

If a Recovery be suffered by Baron and Fem of Lands whereof the Fem hath an estate in Fee Simple, although there was no Tenant to the precipe of the Lands, yet this Recovery shall be a good estoppel against the Baron and Fem and their Heirs, but it would be otherwise, if the Lands had been Entailed at the time of the Recovery. By Rolle Chief Justice. Mich. 1650. B. S. 8. Nov. *Because the Heir in tail comes in per formam doni, and not as Heir to the Fem at the common Law.*

It is not necessary for the Judge to examine a Fem Covert, when she joyns with her husband to suffer a Recovery of her own Lands, because it shall be supposed she doth it freely and voluntarily ; for the Law useth to make the best interpretation of things, yet it is prudential to do it, because it may fall out that the Fem may be brought by fraud or force to do it, and the Law doth not favour the gaining of estates by force or fraud. Trin. 1651. B. S. By Rolle, *and he said that he used to do it. I suppose it is meant of Lands in Fee Simple.*

### *Release.*

If the Defendant in an *ejectione firmæ*, will not defend the title of the Land in question in case the Verdict pass against the Plaintiff, the Ejector may Release the costs to the Plaintiff. Hill. 1649. B. S. 11. Feb. *For he is the Defendant in Law, although the title do not concern him, and it is the others fault that he was not himself made Ejector to defend the title.*

able, by which means he might have had the costs.

One is not bound to give a Release unto the Sheriff for moneys which he receives from him, which he owes for him by vertue of an Execution; but he must give him a note under his hand, that he hath received it. *Hill. 1650. B. S. By Rolle Chief Justice & the Justices.* Whether he be bound to give him such a note, and more then a release, for the Sheriff is an Officer of the Law, and upon payment of the money, the Law gives him his discharge.

*Recital and Misrecital.*

If a Statute be Misrecited in pleading in a matter which goes to the ground of the Action, which is brought upon the Statute; it is not helped after a Verdict, by the Statute of *Jeofailes*; but if it be Misrecited only in a circumstantial matter, and which goes not to the ground of the Action, it is helped after a Verdict by that Statute. *Trin. 1650. B. S. For the Statute helps only matters mispleaded in matter of form, and not matters of substance, vid. Jeofailes title Pleas and Pleading.*

*Report.*

By the custom of the Court, the Secondary ought not to make any report (of any matters referred unto him by the Court) upon the last day of the Term, for that day is properly appointed for motions only. *Trin. 1650. B. S. And if there should grow any question upon the report, there would be no time to be given to the party concerned to speak to it that Term, so that the matter cannot be determined then, and so the report is to no purpose.*

Re-

*Reversion.*

If one have a Reversion expectant upon a Lease for years, he may make a Lease of this Reversion unto the Lessee for years, for one year, and after make a Release in Fee to the Lessee for years of the Reversion, and by this conveyance, the Reversion in Fee will pass to the Lessee. *Mich. 1650. B. S. For by this Lease and Release all the Estate in the Reversion is out of the Reversioner and in the Lessee.*

*Reference.*

It was said, *Hill. 1658.* to be the usual practice of this Court, since the new regulation of the Chancery, in an Action of debt upon an obligation, if the Defendant do before he pleads offer to pay the Principal and Use Money and Charges to the Plaintiff, to refer the whole matter to the Secondary to state the business betwixt them, and to stay the proceedings at Law in the mean time.

Matters of Fact in difference betwixt party and party in a cause depending in Court, are not to be Referred to the Secondary, for such matters are tryable by the Jury who are to try the cause, but matters concerning the due proceedings, or undue proceedings in the cause, by either of the parties are properly to be referred unto him, and for him in some ordinary cases to compose the differences betwixt them, and in others to make his report to the Court how the matters do stand. *Pasc. 1650. B. S. That they may settle the differences according to Rules and Orders of the Court.*

If a matter in difference betwixt the Plaintiff and the Defendant be referred to the Secondary, and one of the parties will not attend at the time appointed, to hear the business referred; the other party may proceed in the Reference alone, and get the Secondary to make his report without hearing of the other party. *Trin. 1651. B. S.* For one party cannot compel the other to attend; and therefore such References would many times take no effect for want of the presence of both parties, if a report may not be made notwithstanding one of them refuseth to attend; and if he be prejudiced by not being heard before the Secondary, it is his own fault that would not attend as the Rule directed.

*Rights.*

Lands between the high water Mark and the low water Mark do appertain to the Lord of the Mannor next adjoyning, of Common Right. *Pasc. 23. Car. B. r. By Rolle. Q. tamen, Whether they do not rather belong to the King, for it hath so been held, except the Lord can claim such Lands, by any particular Grant from the Crown.*

*Reddidit se.*

If a Defendant render himself in discharge of his Wapl after Judgment, yet if the Plaintiff commit him not in execution in three Terms following, he shall be discharged upon common Wapl as if he were committed for want of Wapl upon action. *Per Magistrum Livesey, & al. &c. P. 21. Car. 2. Regis.*



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**I**f the Defendant render himself to custody in discharge of his Wapl upon the day of the Return of the second Sc. Fa. against the Wapl sedente Cur. or if an Action be brought upon the Recognisance, if he render himself upon the day of the return of the Process against the Wapl sedente Cur. the Wapl are discharged. P. 21. Car. 2. R. Per Magistrum Livesey, & al.

**I**f the Defendant render himself to the Marshal in discharge of his Wapl, and the Wapl here be discharged by the Secondary, no Sc. Fa. can afterwards be sued out upon that Recognisance. P. 21. Car. 2. R. Per Magistrum Livesey, & al. &c.

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### *Scire Facias.*

**A** *Scire Facias* to repeal a Patent, is well brought in the Kings Bench, though a *Scire Facias* be then depending in the Chancery, for the same cause. 3. H. 7. 7.

It was said by Glyn Chief Justice, in the case betwixt Newton and Raspoole, Trin. 1657. That a *Scire Facias* which is taken out upon a Judgment which is only signed in the Office and not made up upon Record, is not good; but the Record of the Judgment ought first to be made up, and then a *Scire Facias* to be taken out, for before that there is no Record to warrant the *Scire Facias*.

One may have a *Scire Facias* to revive a Judgment upon which no Execution was taken, if it be but ten years past since the Judgment was had, without any motion to the Court for it, and if it be  
under

under ten years since the Judgment was had, a *Scire Facias* may be moved for to revive it at the side Bar; but if it be above ten years since the Judgment was had, a *Scire Facias* may not be had without moving the Court for it. *Pasc. 24. Car. B. r.* But the Court will not deny it, if it be moved for. The side Bar is a place where a rail or bar is set up neer to this Court below the Court in Westminster-hall, where the Judges stand and rest themselves before the Court sits, and where they put on their Robes, and put off their Robes; and there is another like it by the Common Pleas, and it is called the side bar, because it is on one side of the Court, and not in the face of it. *Vid. Title Judgment.*

A *Scire Facias* to revive a Judgment, ought not to be granted, if the Record be not in the Court where the *Scire Facias* was moved for. *Trin. 24. Car. B. r.* For the Record is the Warrant for the *Scire Facias*, and if there be no such Judgment, there is no ground to move for it.

A *Scire Facias* ought to be directed into the County where the original Action was brought, upon which the Judgment to be revived by the *Scire Facias* was obtained. *Trin. 1650. B. S. 23. Car. B. r.* For it shall be intended that the party against whom the Judgment was obtained doth inhabit still in that County.

A *Scire Facias ad audiendum errores* is not well brought before the Record of the Judgment be certified into the Court, to reverse which, the Writ of Error was brought. *21. Car. B. r.* For there is no record in Court to warrant the granting of it, before the Record of the Judgment is certified.

If one sue out two Writs of *Scire Facias* one after the other, there ought to be seven days distance between

tween the first and the second *Scire Facias*, that it may plainly appear there were two distinct Writts of *Scire Facias* taken forth. *Mich. 21. Car. B. r. It is meant upon one and the same Judgment, as the Course is.*

A *Scire Facias* ought to be as short as possible, because it is the nature of Writts to set forth things very briefly, and a Writ is therefore called a Brief from the Latin word *breve*, which signifies short or compendious. *Mich. 21. Car. B. r. And a Scire Facias is in the nature of an original Writ.*

If a *Scire Facias* be brought against Bapl upon a Recognisance in a Writ of Error generally without expressing the action or the condition of the Recognisance, there the *Scire Facias* must be returnable on a general return *ubicumq;* but if the action and the Condition of the Recognisance be set forth in the *Scire Facias* and appears to be by Bill, then the *Scire Facias* must be returnable at a day certain in Court. *Per Magistrum Livesey, & al. &c. P. 21 Car. 2. Regis.*

Of latter times it hath been used to make out a *Scire Facias* with a *Fieri Facias* or Writ of Execution comprised in it, against an Executor or Administrator; and both make but one Writ, whereas anciently a *Scire Facias* and a *Fieri Facias* were two distinct Writts or Processes, and to be distinctly and severally executed. *Trin. 22. Car. B. r. But they may make them distinct Writts at this day if they please. The making out of a Scire Facias with a Fieri Facias was devised for the speedier way to obtain execution upon the Judgment.*

A *Scire Facias* may be traversed before Judgment given upon it, but after a Judgment there can be no reverse, for then it is too late to plead to it; but a Writ of Error may be brought to reverse the Judgment given upon the *Scire Facias*, if the *Scire Facias* was not good upon which it was grounded. *Trin. 22. Car. B. r.*

When a Judgment for moneys is reversed by a Writ of Error in this Court, a *Scire Facias* shall lie against the Plaintiff in the Judgement reversed, to shew cause why the Plaintiff in the Writ of Error, whereby the Judgment was reversed, should not have the moneys repayed unto him, which were recovered and levied upon him, by virtue of the Judgment reversed. *Mich. 22. Car. B. r. And to the Scire Facias it seems he may come in and plead. whether this may not beget circuits of Actions.*

A Writ of *Scire Facias* is not an original Writ, but it is a Record at the time of the Caption, before it is entred at *Westminster*, and an Action may be brought where the Caption is. *Pasc. 23. Car. B. r.*

*Q.* In a *Scire Facias* brought upon a Judgment given in the Common Pleas, it is necessary to shew before that Judge the judgment was given, but it is not necessary to do it in a *Scire Facias* upon a Judgment given in this Court. *23. Car. B. r. Q. Rationem ferentia.*

An old Judgment may be revived by a *Scire Facias* granted upon a motion to the Court, but if a *Scire Facias* be taken out to revive an old Judgment without leave of the Court, the *Scire Facias* is not good, but is reversible. *Trin. 23. Car. B. r. For a Scire Facias is not the Process of the Court,*

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*but a fiction of the party in abuse of the Court.*

If one do not proceed upon a Writ of *Scire Facias* within a year and a day after it was taken out, he cannot after that time proceed upon that Writ, but must sue out a new *Scire Facias*, for the old Writ is discontinued. *Hill. 1650. B. S. Because there was no proceedings upon it in reasonable time.*

If an Administrator obtains a Judgment for a Debt due to the Intestate, and the Administrator doth afterwards dye Intestate, and letters of Administration is granted to one *de bonis non*, &c. of him that dyed first Intestate; this Administrator cannot have a *Scire Facias* to revive the Judgment obtained by the first Administrator of the first Intestate, but he must bring a new Action to recover that Debt. *Hill. 1650. B. S. For he is no ways party or privy to the first Judgment, but a meer stranger to it.*

There must be seven days exclusive between the Test and return of each *Scire Facias* against *Wapl* and not one four or five days. *Per Magistrum Livesey, & al. P. 21 Car. 2. Regis.*

Also there must be seven days exclusive between the test and return of every *Capias ad satisfaciendum*, to Warrant a *Scire Facias* against *Wapl*, and that the *Capias* ought to be delivered to the Sheriff four days before the return be out. *P. 21 Car. 2. Per. Magistrum Livesey, & al. &c.*

### *Statute.*

He that will take advantage of a Statute by pleading it, must shew in his pleading, that he is with-  
for



some Proviso of that Statute, if the Statute which he pleads, be a particular Statute, and not a general Statute. 21. Car. B. r. 25. H. 7. f. 1. For the Judges are bound *ex officio* to take notice of all general Statutes which concern all the people in general, but not of particular which do only concern particular persons or places, except they be particularly pleaded, and set forth before them.

The Statute of *primo Jac.* which concerns Attorneys and Solicitors, doth not extend to special retainers of Attorneys and Solicitors. Mich. 23. Car. B. r. For that Statute is a general Statute, and not a particular.

If an issue be joyned upon a Collateral point, arising in the pleading, and no place is alledged whence the venue may come, this fault is helped after a Verdict, by the Statute of *Jessairs*, but if the issue be not joyned upon a Collateral matter, it is not helped by the Statute, if no place be alledged, for the Statute intended not such extraordinary issues joyned upon Collateral points to the Statute.

The Statute which concerns the returning of Juries, doth only extend to Juries to be returned to serve in any of the Courts at *Westminster*. Mich. 23. Car. B. r. And not to inferior Courts.

The Statute of 23. H. 8. c. 5. concerning Sewers, was made for the ease and benefit of the people, to wit, the Defendants who are prosecuted upon that Statute, and they may plead that Statute or not at their election. Hill. 22. Car. B. r. *see the Statute.*

If one acknowledge two Statutes upon his Lands one after the other, and satisfy the former Statute, with out doth not vacate it, and the Conusee of the latter



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Statute takes out an extent upon the Lands; this extent may be avoided until the former Statute be avoided by a *Scire Facias*. *Hill. 22. Car. B. r.* For the Defendant is not to take notice of private acts done between the parties, and it doth not appear that the former Statute is satisfied; but upon the pleading an *Issue* upon the *Scire Facias*, it will appear whether it be or no.

A Statute which is made onely in affirmance of the Common Law, that is, that doth not enact any new thing, but doth onely enact that which was provided for by the Common Law before the Act made though it did not so plainly appear, is nevertheless a Statute, and may be pleaded as a Statute, although the Defendant hath a plea at the Common Law also. *Regi. 23. Car. B. r.* For it enacts nothing contrary to the Common Law, and may therefore well stand with it.

The ancient Statutes were made upon the Petition of the Commons in Parliament unto the King; in which Petition was set forth that which they desired of the King might be enacted, and passed not by Bills prepared, as now they do. *Regi. 23. Car. B. r.*

A Statute acknowledged upon Lands, is a present duty, and ought to be satisfied before an Obligation which is not so. *Mieb. 23. Car. B. r.* For a Debt due upon an Obligation, is but a chose in Action, and recoverable by Law, and not a present duty due by Law, as a Debt due upon a Statute, Judgment or Recognisance is, upon which present execution is to be taken out, without further suit.

It was held by this Court 5. Car. in *Simons Case* that the Statute of 1. Maria, was repealed by the

Statute

Statute of 1. Eliz. But *Quere*, for it was doubted by the Court, whether it be repealed in the whole, or in part onely. *Mich. 23. Car. B. r. Compare the Statutes.*

The Statute of 21. Jac. of *Jeofailes*, which is to help defects in Pleadings, doth extend to all inferior Courts, as well as to the superiour Courts; for it is a beneficial Law for the people, and shall therefore be expounded largely, and not with a restriction. *Pasc. 24. Car. B. r. As some other Statutes touching the proceedings in Law are.*

The misrecital of a Statute in pleading, in a thing which doth not concern the ground of the Action which is brought upon the Statute, is helped by the Statute of *Jeofailes*. *Trin. 1650. B. S. vid. antea* in Pleadings.

Although a penal Statute shall not be extended to equity in the exposition of it; yet it shall be so expounded, that the true intent and meaning of it may be known. *Mich. 1650. B. S. For if the former should be, the exposition would be too large and arbitrary; and if the latter should not be, the exposition would be too narrow, and would extenuate the force of the Statute, and hinder the true intent and meaning thereof.*

*Satisfaction.*

Satisfaction pleaded to an Obligation which appears to be of a thing which was performed before the date of the Obligation, is not good. *Mich. 22. Car. B. r. For the date of the Obligation which creates the duty, shall not be intended to be after the enacting and delivery of it, and so such satisfaction*

*can no ways answer the duty created by the Obligation.*

Monies that are to be paid by an Executor, by vertue of a Decree in Chancery, are not to be satisfied by the Executor before a Debt due upon an Obligation made by the Testator, and grown due after the death of the Testator. By Rolle Chief Justice. *Trin. 23. Car. B. r. For a Debt due by Law, is to be preferred before a Debt created by a Decree in Equity.*

Whether a Legacy given by the Testator, or a Covenant entred into by him in his life time, and broken in the time of the Executor, shall be first satisfied. *Trin. 23. Car. B. r. Q. In Eeles and Lamberts Case, after many arguments pro and con, and held mischievous to be determined either ways.*

A Guardian may acknowledge Satisfaction upon Record, for the Infant unto whom he is Guardian, for a Debt, which as Guardian he hath recovered for the Infant. *Trin. 23. Car. B. r. For it is reason that he that hath power given him to recover a Debt for the Infant, should have also power to discharge the party of whom it is recovered, when he hath received it of him.*

The ancient course of this Court was, that if the Defendant will make Satisfaction for that which he is sued for, to the intent that the Court may cause the Plaintiff to cease his prosecution, and may receive the Satisfaction offered, that the Defendant should come into Court before he pleads, and tender present Satisfaction, or else the Court would not receive this tender, nor order any thing in it. *Hill. 1650. B. S. But now if the Defendant do offer this satisfaction after he hath pleaded, the Court will not utterly reject it but will upon the prayer of the party, refer the matter to him.*

Secondary to end the matter, the Defendant make full Satisfaction for the principal matter, and for costs and damages suffered and expended by the Plaintiff in the suit.

*Sheriff and Under-Sheriff.*

In some cases the Court will order the Sheriff to attend the Secondary of the Office, with his Book of Free-holders of the County where the Land in question doth lye, that an indifferent Jury may be returned for a tryal at the Bar. *Mich. 22. Car. B. r.* That is in such cases where the Court conceives the Sheriff will not return an indifferent Jury.

A Sheriff is not bound to return a Writ directed unto him, except the party whom the Writ doth concern, do tender him his Fees for the executing of it; that is in such cases where he is allowed Fees. *Mich. 22. Car. B. r. Q. de ceo.* For the very words of the Writs do enjoyn the Sheriff to make a return of them. *Mich. 22. Car. B. r.* So that it seems he is to return them, whether the parties concerned do call for him or not; and if he be not paid his Fees, where he is allowed to take them, he may recover them by action.

A Sheriff out of his Office cannot be fined by the Court, because he ceaseth to be an Officer of the Court; but a Tipstaff may be sent for him, to bring him in to answer a misdemeanor committed by him when he was in his Office. *22. Car. B. r.*

The old Sheriff of a County, is Sheriff until the new Sheriff be sworn, although he be chosen. *Hill. 22. Car. B. r.* For the taking of his oath doth complete him in his Office, and before he is so compleated, the

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*old Sheriff is in Office ; for there must not be a vacancy, lest there be a failure of justice for want of a Sheriff.*

The Under-Sheriff ought always to have his Deputy to be attendant in Court, to receive and execute their commands, and to give account to the Court of businesses which may fall out concerning the Sheriff and his Office. *Hill. 22. Car. B. r.*

Both the Sheriffs of the City of London, are in Law but one Sheriff, and one of them is not onely Sheriff of *Middlesex*, and the other Sheriff of *London*, or one the Kings Sheriff, and the other the City Sheriff, as it is commonly said. *11. Feb. Hill. 1650. B. S.*

Every Sheriff ought to answer for the misdemeanors of his Bailiffs. *Trin. 1651. B. S.* For they are his servants, and ought to be under his Government, and he usually takes security for their faithful and just performance of their duties in their places.

### *Suggestion or Surmise.*

A Suggestion made to the Court, that the thing for which it is libelled in the Admiralty against the party, was done *infra Corpus comitatus*, whereas in truth it was done beyond the Seas, is notwithstanding a good Suggestion, for the Court to grant a prohibition unto the Admiralty upon ; for it is but to try the jurisdiction of the Admiralty, and not the merits of the cause ; and the Court cannot then tell whether it be true or not, but will suppose it to be true ; and if it be false, the Plaintiff in the Admiralty may joyne issue upon it, and try it at the Law, and if the Verdict pats for him, he shall bear his costs, and the Court



will grant a consultation that he may proceed in the Admiralty. *Mich. 22. Car. B. r. Q. As to the Cases.*

Matters of Record ought not to be stayed upon the bare Suggestion or Surmise of the party; but there ought to be an Affidavit made of the matter Suggested, to induce the Court to ground a Rule for staying the proceedings upon the Record. *Mich. 1650. B. r. For the Law favours not the stopping of the proceedings in Law, except there be very good cause for it.*

*Surrender.*

If Lessee for Life, do accept of a Lease for years, it is a Surrender in Law of his Lease for life. By *Rolle. Pasc. 24. Car. B. r. For if it should be otherwise, the Lease for years would be made in vain and to no purpose, for both the Leases cannot stand together, and where doubtful things may have an operation by a reasonable construction in Law, the Law will support them, rather then to construe them to be null and to none effect.*

*Superfedeas.*

If a Writ of Error in some cases provided by Statutes be brought, there ought not to be a Superfedeas granted to him that brings the Writ of Error, to stay Execution upon the Judgment which is to be reversed by the Writ of Error, until he that brings the Writ of Error have put in security by Recognizance to prosecute with effect, and to pay costs and damages, if the Plaintiff in the Error be Non-sute, or the Judgment be not reversed by the Writ of Error, but affirmed. *Trin. 24. Car. B. r. See the Statute.*

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It is very hard to compel the party that brings a Writ of Error, to take out a Superfedeas, into all the Counties where he hath Lands or goods lyable to the Execution upon the Judgment; for the reverſing whereof, the Writ of Error was brought. *Mich. 1650. B. S. By Rolle Chief Juſtice. Yet it is a ſure way for him that doth bring the Writ of Error to do it, to avoid a greater trouble and charge, which may otherwiſe befall him by executing the Judgment, if he have a violent and malicious adverſary, then by taking out of the ſeveral Writs of Superfedeas.*

After a Writ of Error is brought and allowed by the Court where the Judgment was given, for the reverſal whereof, the Writ of Error is brought, the hands of the Court are fore-cloſed, that is, ſtopped from proceeding upon the Judgment any further, and there needeth no Superfedeas to be directed unto them, nor is it neceſſary to mark the Roll. *Mich. 1649. B. S. For every one ought to take notice of ſuch general Writs as may any ways concern them; but it is more ſecure to mark the Roll, to avoid further trouble.*

If a Writ of Error be brought to reverſe a Judgment given upon a *nihil dicit*, the bringing of this Writ of Error, is a Superfedeas to ſtay Execution upon the Judgment, notwithstanding the late Statute that enacts that a Writ of Error ſhall be no Superfedeas to ſtay Execution upon a Judgment. *Pafc. 1651. B. S. 13 Maii. For that Statute only extends to Judgments given upon a Verdict, and not to Judgments given upon a nihil dicit, or upon a non ſum informatus, or upon a demurrer; for the Court will expound that Statute largely, becauſe it is not thought ſo beneficial as it was intended by the makers thereof.*

*Surprisal.*

The Court is always very cautious that no person, that hath any cause depending before them, be Surprised, especially in such matters as are final and penal to the party that is surpris'd. *Mich. 1649. B.S.* Because by Surprisals, the parties Surprised, are deprived of making their full defence, and thereby beget clamour and give no satisfaction, but cause more suits and trouble to the parties.

*Secondary.*

Where the Secondary shall return a Jury and where not, *Vid. Jury. 161.*

*Settlement.*

If one hath hired a dwelling house in one Parish of 10*l.* per Annum Rent, and be settled in that house but a small time; yet this is such a settlement in the Parish where the house is, that the Justices of the Peace have no power to make an order to remove the party settled, out of the Parish wherein he was so settled; except the party so settled be lame or blind, or likely to be suddenly chargable to the Parish where he was so settled. *Mich. 1650. B. S. 11 Nov. See the Statute 43 Eliz.*

*Tryal*

*Tryal and Proceedings to it.*

**N**Ote, it is not the course of this Court to have Tryals at the Bar upon *Saturdays*, because those days are appointed for matters in Law; yet in the Case of *Dikes* against the Lady *Lake*, a Tryal was permitted to be upon a *Saturday*; because the Jury were Adjourned to that day by the Court, and the Court was also informed that the Tryal would not be long, and so would little hinder the business of the day.

No Tryal ought to be had at the Bar, the same Term that the Defendants Plea is put in, but the Term following, by the ordinary Rules of the Court. *Hill. 21. Car. B. r.* *But it may be by special rule of Court, or in Causes depending on the Crown side, where in the King is a party.*

In an appeal of Mayhem, the Court may judge of the Mayhem by inspection of the party, or put it upon the Tryal of a Jury. *8 H. 6. 15.*

This Court will grant a *Habeas Corpus* to Try a Felon at the Bar, although the Felony was not committed in the County of *Middlesex*, if there be not a Gaol Delivery in the usual manner in the County where the Felony was committed. *Hill. 21. Car. B. r.* *This is done for the expedition of Justice in punishing of Offenders.*

A Tryal in that Court where the issue Tried was not joyned, is not a good Tryal. *Hill. 21. Car. B. r.* *For there was nothing before them to Try, and so it was Coram non iudice.*

Where the Plaintiff will not Try his cause in such due time as he ought to do, by the Rules of the Court the

the Defendant may upon warning given thereof to the Plaintiff proceed to the Tryal of it himself by Proviso. *Hill. 21. Car. B. r.* That he may free himself from the Action that is brought against him; this is called a Tryal by Proviso, and is given by the Statute. See the Stat.

Justices of Peace may by their Commission Try a murder, at the quarter Sessions, committed in the County where they are Justices. *Pasc. 22. Bar. B. r.* But they do not often do it, but leave such matters to be Tryed by the Justice of the Gaol Delivery at the Assizes, that such Tryals may be more solemn in the eye of the Country.

If any of the Defendants Witnesses to be used at a Tryal, do live above forty miles distant from London; the Plaintiff by the Rules of the Court ought to give the Defendant fourteen days notice of the Tryal before he try his cause. *Pasc. 21. Car. B. r.* That the Defendant be not surpris'd for want of sufficient time to get his Witnesses to be at the Tryal; which fourteen days is accounted a convenient time for the doing thereof.

Upon a Tryal at the Bar, when the Jury is at the Bar, and the Court ready to proceed, and the panel of the Jurors names is delivered to the Secondary, he bids the cryer call the Defendant, which he doth, and if his Counsel say they appear, then the Secondary bids both parties in French, *gardez vostre challenges*, that is, take heed to your challenges, and then proceeds to swear the Jurors; but if the defendant doth not appear after thrice calling by the Cryer, the Plaintiffs Counsel do pray the Court the Verdict may be taken by default. *Trin. 24. Car. B. r.* It is called a Verdict by default, because if it pass against the Defendant, where

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*where the Defendant had right, and might have defended himself; it is not the fault of the Court, or Jury, but his own, that would not appear and defend his cause, but suffers the Verdict to be taken against him for lack of appearance, whereby he is concluded guilty.*

Where a Tryal is had by Proviso, the Plaintiff may be called before the Jury is sworn, if the Defendant do require it. *Trin. 22. Car. B. r.* For the Plaintiff is as it were in the place of the Defendant, because the cause is brought to a Tryal by the Defendant.

The Court will not grant a Tryal at the bar, except there be oath made, that the matter to be Tried is very difficult, or of great value. *Mich. 22. Car. B. r.* In which cases it is fit the Tryal should be at the Bar, where Tryals are more solemn, and where more time may be spent in the Tryal than can be at the Assizes; but otherwise this Court is not to be troubled with Tryal of Causes, because the Court is thereby hindered in their proceedings in matters of Law, which are the proper businesses of the Court, and not matters of fact.

After a Tryal hath been in a cause, the Court ought not to order that there shall be a new Tryal of it, except it doth appear that there was a surprisal in the Tryal had, or some fraudulent miscarriage in it; for if they might in any case they please, order a new Tryal, this would be for the Court to have an Arbitrary power, which the Law will not permit. *Mich. 22. Car. B. r.* For this would weaken the Common Laws, to the prejudice of the people.

Where warning is given of a Tryal to the Attorney in the cause, and the Attorney cannot give notice of this warning timely enough for his Clyent to prepare for the Tryal, the Court will not force the

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Attorney to go to a Tryal, but will give longer time. Mich. 22. Car. B. r. *Because the Court will not sur- prise any person, and such Tryals very seldom do deter- mine the business, but beget more trouble and charges to both parties; and it may be it was neither the At- tornies nor his Clyents fault he had not more timely notice.*

Where there ought to have been a place alledged whence the *venue* should come, and there is no place alledged, but an issue is joyned, and the *venire* is *de corpore comitatus*, and a Tryal is thereupon had, this is good Tryal, and there ought not to be a re- pleader. Mich. 22. Car. B. r. *For here is a good pleading and a good issue joined and well Tryed by a Jury, and a repleader is to be only where the Pleading is vicious, and hath not brought the issue in question, which was to have been Tryed.*

If the Court do believe that the Jury have given their Verdict against the evidence given unto them, they may order a new Tryal to be in the case. Mich. 22. Car. B. r. *Q. Tamen, For the Jury are upon their Oaths, and it may be they know something of their own knowledge more then the evidence which moved them to give their Verdict so, and the party against whom the Verdict is given, is not without remedy, for he may bring his Attaint against the Jury if he please; yet new Tryals have sometimes de facto been awarded in such cases.*

There may be a good Tryal in a cause, although the Defendants Plea be ill. Hill. 22. Car. B. r. *For the Tryal depends not upon the Plea, but upon the issue joyned; and if there be a good issue joyned, the Tryal is good, whatever the Plea be.*

Where



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Where the Plaintiff will not try his cause after issue is joyned, the Defendant may try it afterwards when he pleaseth. *Hill. 22. Car. B. r. That he may free himself from the sute. Vide antea.*

When the Defendants Attorney hath told the Plaintiffs Attorney what Plea he will plead, the Plaintiffs Attorney may give him warning for a Tryal, although the issue be not made up in the cause. *Hill. 22. Car. B. r. For after Plea pleaded, it is in the Plaintiffs choice whether he will reply or no, for if he will not reply, he may make up the issue when he pleaseth, and proceed to a Tryal.*

If a Cause to be Tryed, be not entred into the Judges Book, before whom it is to be Tryed four days before the Cause is to be Tryed, the Plaintiff may enter a *ne recipiat* in the Judges Book; that it may not be entred after that to be Tryed at that time if the Defendant please. *Hill. 22. Car. B. r. For the Cause ought to be entred in due time, that the Defendant may prepare for the Tryal; and he cannot well till it be entred whether the Plaintiff will proceed or no.*

If upon a Tryal to be had at the Bar, the Jury be not ready at the day to try the Cause, the Cause cannot be Tryed at the Bar any other day of that Term, without the consent of both parties and a special rule of Court. *Pasc. 23. Car. B. r. For it would be too long and too chargable it may be, to keep the Witnesses in Town to another day; and if they should go out of Town, it might be too short a time, and too much trouble to bring them up again the same Term.*

The agitation of a Cause in one Court, is no cause to put off the Tryal of the same Cause depending in another Court. *Pasc. 23. Car. B. r. For the proceedings*

endings of one Court of Law, ought not to clash with the proceedings of another Court; but it is not so betwixt the Courts of Law and the Chancery, as it is a Court of equity.

The King may try his own cause in what Court he pleaseth. *Pasc. 23. Car. B. r.* This is by his prerogative; for all Courts of Justice are his Courts, and it is not reasonable he should be streightned in his choice where he will proceed, but have liberty to sue where he pleaseth.

A local matter generally, is not to be tryed in a foreign County, but in the County where the Cause of action ariseth. *Pasc. 23. Car. B. r.* For there may be the best knowledge of the matter be had, and it is also for the greater ease of the people, and less charge; yet sometimes and upon special reason it is otherways.

If one be committed to the Gaol for one Felony, yet the Justices may try him for another Felony, for which he was not committed. *Trin. 23. Car. B. r. By Baron Justice. Vide antea Tit. Felony.*

A Decree in Chancery shall be tryed by a Jury and not by it self, for it is not a Record, but it is a Decree recorded. *Mich. 23. Car. B. r.* And there is difference betwixt a Record and a thing Recorded; for a Record is a Judgment or other act done in a Court of Record; and Recorded there, but the Chancery as it is a Court of equity, is not a Court of Record, but an arbitrary Court, although it be a Court of Record as touching things agitated in the Pettibag-Office.

Although the Plaintiff after issue joyned, and at the Assizes where he was to try his Cause, do enter a retraxit, yet he may try the cause at the next Assizes after if he please, for the retraxit doth only import, that he intends to forbear to try his Cause, *hac vice*

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vice only; and if he do not Try it at the next Assizes after, then the Defendant may, if he will, try it by Proviso; and if the Defendant do not then try it by Proviso, the Plaintiff may then give new notice of a Tryal to the Defendant, and Try it at the next Assizes following. *Mich. 23. Car. B. r.*

- One that is not served with process to give his Testimony at a Tryal, may not be examined upon *voire dire* concerning any matter which concerns the Tryal. *Mich. 23. Car. B. r.* For that is in a manner to examine him as a Witness in the Cause, which ought not to be, because he appears not as a Witness.

A Tryal at the Bar ought not to be had for houses lying within the City of London. *Mich. 23. Car. B. r.* For by their customs they may hold Plea concerning the Title of Free-holds within the City.

If the Plaintiff give notice to the Defendant that he will Try his Cause that Term, although it be not Tried at the day appointed, yet he is not bound to give new notice of a Tryal, if he Try it any time within that Term, for one notice is sufficient for the whole Term, and if he Try it any day that Term, it is well enough. *Hill. 23. Car. B. r.*

According to the old use of practice in this Court there ought to be but ten Tryals at the Bar in East Term. *Pasc. 24. Car. B. r.* Because Tryals at the Bar are a great hindrance to other businesses which are more proper for the Court, yet now they are increased many times to double the number; for Tryals at the Bar are now more desired than antiently they were, though they be more chargable, yet are they more learned and give better satisfaction to all parties, and are more likely to be final than Tryals had at the Assizes.

If there be warning given for a Tryal, and no

appear at the day, there ought to be a new notice given if the party will Try his Cause at another day. *Mich. 24. Car. B. r. For else the Defendant cannot know when the Plaintiff will Try his Cause, or whether he will Try it or no.*

The consent of the owner of the Land, to make an Ejector to Try the Title of the Land, is good if it be not a plot betwixt him and the Ejector to oust the Lessee of the Land of his possession. *Mich. 24. Car. B. r. For there can be no other inconveniency in it.*

A Tryal at the Bar may not be had by the consent of the parties without leave of the Court. *Mich. 24. Car. B. r. For the Court is not bound Ex Officio to grant a Tryal at the Bar, but it is in their discretion to grant it, or not to grant it; and the parties may not presume to impose things upon the Court which they may do, or not do at their pleasures.*

In a Tryal for subtracting of Tithes in an Action grounded upon the Statute of 2 Ed. 6. the Plaintiff ought first to begin with the proof of the value of the Tithes, before he proceeds to shew his Title to them. *Mich. 24. Car. B. r. For he must first prove there were Tithes, and of such a value taken away, which is the very ground of the Action, before he can make any Title to them; for if there were no Subtraction, there is no cause of Action.*

It is a mis-tryal for a thing to be Tryed before a Judge, who hath interest in the thing in question, and without the request or consent of the parties concerned in the Tryal will not help it. *Mich. 24. Car. B. r. For such a Tryal cannot be supposed to be indifferent, for none ought to be Judge in his own cause, or in any cause wherein his own interest is any ways concerned.*

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A mis-tryal is helped by the Statute of *Jeofails*, but not a void Tryal, to wit, where there is no issue joyned to be Tryed ; but in such cases there must be a replender, that the matter in question may be put in issue to be Tryed. *Mich. 24. Car. B. r.*

The day for a Tryal at the Bar ought to be entred into the Clerks book in the Office, *viz.* the Clerk of the Papers. *Mich. 1649. B. S.* And before it be entred, there ought not to be notice given of the Tryal for the day cannot be precisely known.

One that is a priviledged person in this Court ought not by reason of his priviledge only to have a Tryal at the Bar granted unto him, where the Title of Land is in question, but there must be difficulty in the matter to be tryed, or else it must be of great value. *Hill. 1649. B. S. 4 Feb.*

A Tryal at the Bar ought not to be granted before the Defendant hath pleaded, and issue be joyned. *Hill. 1649. B. S. 11 Feb. 12 Feb. 1656.* For before the cause is not ready for a Tryal, nor doth it appear whether the parties intend to proceed to a Tryal or not.

Of latter times there hath been Twenty Tryals granted to be at the Bar in Easter Term, but not above. *Pasc. 1650. B. S. 1 Maii.* But anciently not above half the number. *Vide antea.*

Although the Defendant do go to a Tryal without sufficient notice given unto him of the Tryal, and there be a Tryal accordingly, this Tryal is not binding unto the Defendant, but he may (if he please) have a new Tryal granted for want of due notice. *Pasc. 1650. B. S. 19 Ap.* For the Rules of the Court are not to be broken by the consent of the parties ; and it may be if he had had due notice, he might have been



...en able to make a better defence, though he ventured  
...go to a Tryal with such proof as he then had.

By the ancient practice of the Court, all the Try-  
als at the Bar which are had in Easter Term, ought to  
be Tried a fortnight before the end of the Term.  
*Pasc. 1650. B. S. 1 Maii.* And the remainder of the  
Term was to be spent in matters of Law, and in other  
businesses more proper for the Court then the Tryal of  
Causes.

In ancient times there were wont to be Tryals in  
Parliament by Juries, but of latter times no such  
Tryals have been. *Pasc. 1650. B. S. 24 Maii.* This  
was when Parliaments were more frequently called,  
and sate longer then of latter times they have usually  
done.

The prosecutor in an information brought in this  
Court, ought to bring the cause to a Tryal at his own  
costs, but in an Endictment which is solely at the  
suite of the King, he that is Endicted must bring the  
Cause to a Tryal at his own charges. *Pasc. 1650.  
B. S. 24 Maii.* An information is preferred as well  
for the benefit of the informer as the King, and there-  
fore it is reason he should bring it to Tryal at his own  
charges; but an Endictment is not so.

If at a Tryal the Court do see that one of the par-  
ties is surpris'd, but not by any fault or laches of his  
own, but by some other casualty, they may in their  
discretion put off the Tryal to another time, until  
the party surpris'd may be better provided for his  
Tryal. *Trin. 1650. 3 Julii. B. S.* For this is not  
to delay justice, but to give time that clearer justice may  
be done, and that suits may in more probability be put  
to a conclusion, which upon Surprisal is seldom seen.



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In criminal Causes, Tryals may be at the Bar in *Hillary Term*, and in *Trinity Term*, but not in other causes. *Mich. 1650. B. S.* But only in *Michaelmas* and *Easter Term*. This was the old course, but of late in some special cases, Tryals have been granted to be at the Bar in *Hillary Term*, and *Trinity Term*, to prevent some great inconveniencies which would otherwise have hapned by deferring of such Tryals.

The Court of Chancery will not stay a Tryal at Law by an injunction, when the parties are ready for the Tryal, and have expended their costs for the Tryal; but after the Tryal they will grant an injunction to stay Judgment, if there be equity in the cause. *Pasc. 1652. B. S.*

It is not usual to have any Tryals at the Bar but in *Michaelmas Term*, and in *Easter Term*, except it be on the Criminal side, yet in extraordinary Cases it hath been granted. For example, in a Case of the *Lady Jane Chandois* in a *Trespas* and *Ejectment* when a Tryal upon motion was granted in *Trinity Term*, 1656. upon debate, wherein *Woodward* an ancient Clerk of the Court affirmed, that he remembered two Tryals in a *Trinity Term*. *2. Nota.*

By *Glyn Chief Justice*. *Trim. 1656.* If a Cause be removed out of an inferiour Court into this Court, it ought to be Tryed the same Term it is removed, that the party may not be delayed, for the Law doth not approve of Dilatory proceedings.

By *Glyn Chief Justice*. *Mich. 1658.* A Jury impanel'd to try an issue in one County, may try a thing that is incident to the Tryal of that issue, though it be in another County; as if an *Action of Debt* be brought against an Heir, and he pleads *riens per descent*, and the issue is joyned upon it, the Jury may enquire of assets in any County of England.

By Glyn Chief Justice. Mich. 1658. *In the Case of*  
*Stemman and others against Sir Job Harvey. If a Try-*  
*al at the Bar be directed out of the Chancery, and at*  
*the day the parties will not agree to have the Tryal go*  
*on, this Court will not compel them to it, for this Court*  
*is not bound to enforce Orders made in Chancery.*

If the Plaintiff, in an Action of Trespas and Eject-  
 ment, do bring his cause to be Tryed at the Bar, he  
 cannot compel the Defendant to confess the Lease,  
 Entry, and Ouster, for the Tryal at the Bar was not  
 granted in favour of the Defendant, but of the Plain-  
 tiff; but if the Defendant bring the cause to be Try-  
 ed at the Bar, there he must confess the Lease, Entry,  
 and Ouster, because the Tryal was granted to be at the  
 Bar in his favour. *Pasc. 1652. B. S. And therefore*  
*it shall not be in his power to hinder the Tryal for*  
*want of such confession.*

If a Cause be appointed to be Tryed in one Term,  
 and the Plaintiff doth not then proceed in his Tryal,  
 but rests for a year or more after, if he will after so  
 long time Try the Cause, he must give the Defendant  
 a whole Terms notice before his Tryal. *Pasc. 1652,*  
*B. S. Because by this long delay the Defendant might*  
*not think he would ever try it, and so cannot in a short*  
*time provide to make his defence.*

If a Tryal be had the last day of a Term, Judgment  
 cannot be entred upon that Verdict until the next  
 Term after; for Judgments must be given in the  
 Term. By Rolle Chief Justice. 1652. B. S. *Nor till*  
*the four first days within the Term be passed, for so long*  
*time hath the Defendant by the Rules of the Court to*  
*speak in Arrest of Judgment.*

It was said by Rolle Chief Justice, that the City of  
 Bristol will not bring a matter to be tryed here at the

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Bar, no more then the City of London will. 1654. B. S. *Because it seems they have the like Priviledge to Try the Title of Free-holds within the City, as London hath.*

If at a Tryal at the Bar, in a Trespafs and Ejectment, the Plaintiff and the Defendant do consent, that the Jury shall have a view of the Lands in question, there can no Tryal proceed in the Cause that Term. By Rolle Chief Justice. 1654. B. S. *In respect of the view to be made, and the scantness of time afterwards for the Tryal.*

It is not usual to grant a Tryal at the Bar the same Term it is moved for, but the next Term after, 1654. B. S. *Yet sometimes upon special reasons it is done.*

By Glyn Chief Justice. *Upon a motion for a new Tryal, between Williams and Parrett. Pasc. 1656. B. The Plaintiff is not bound to attend upon the Defendant at his Tryal, but may Try his Cause when he will, if he have given due notice of the Tryal.*

By Glyn Chief Justice. *Upon a motion for a new Tryal, between Askue and Landy. Pasc. 1656. B. S. Although due notice ought to be given of a Tryal, before the Tryal, yet if there be so many Causes to be Tried on the day appointed, that that Cause cannot be Tried, yet the Plaintiff needs not give new notice, but the Defendant must attend till it can be Tried; but if due notice be not given, the Court will grant a new Tryal upon motion and proof thereof made.*

A voluntary Affidavit made before a Master of the Chancery, is not to be given in evidence at a Tryal at the Bar. Pasc. 1655. *For a Master of the Chancery hath not Authority to Administer such an Oath, and therefore if the party did swear falsely, it is not perjury.*

can be indicted for it, because it is *Coram non* iudice; and therefore such Oaths are of little credit to be given in evidence.

If a Tryal be had, and a Verdict thereupon given, the same issue may not be Tried again by the Jury that Tried it before. 1655. B. S. For it is more then probable they will give the same Verdict again. Q. Tamen, For there may fall out to be better Evidence given for him against whom the Verdict passed at the second Tryal, then was at the former, to move them to find contrary to their former Verdict.

*Traverse.*

A Traverse ought to have an inducement to make it relate to the foregoing matter, or else it is not good and formal. Mich. 22. Car. B. r. For else it cannot be known what is Traversed thereby.

If the Court shall change the *venue*, and lay it in a County where the Cause of Action did not arise, the party may Traverse the County if he please, by saying the cause of Action, if any be, did arise in the County of A. and conclude, and so draw the *venue* by pleading with an *absque hoc*, that the cause of Action did arise where the *venue* is laid, into the right County where the cause of Action did arise. Trin. 23. Car. B. r.

If one will take a Traverse to a Declaration, he ought to Traverse that part of it, the doing whereof will make an end of the matter for which the Plaintiff declares, and then is the Traverse good. Pas. 24. Car. B. r. Else not, for it is to no purpose.

Where the defendant hath given a particular answer in his Plea to all the material matters contained in the

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*the Declaration, there he needs not to take a Traverse. Pasc. 24. Car. B. r. Pasc. 1648. B. S. For a Traverse is the affirming of one thing, and the denial of another thing; and when a thing is answered, what need is there of a denial of it? for the answering of it doth suppose such a thing was.*

Where there is a Disseisin, and a descent alledged in a Declaration, concerning the Title of Land, if the Traversing of the Disseisin will make an end of all the matter in question, there the Disseisin is to be Traversed, and not the descent; this is to be understood in such cases where by supposition the party comes to the estate by Disseisin. *Pasc. 24. Car. B. r.*

Where the Defendant hath confessed and avoided all the matter that is contained in the Declaration, there he needs not to take a Traverse. *Pasc. 24. Car. B. r. For a confessing and avoiding is a full answer of the matter alledged, and so there needs no Traverse of it, or denial of the thing.*

### *Title.*

If there be an Inquisition found, by which the King is Intitled unto Lands, and the Inquisition is not answered nor Traversed, the Lands found in the Inquisition, shall be supposed to be in the hands of the King. *21 Car. B. r. Because there appears nothing to the contrary to question the Kings Title found by the inquisition.*

If one be admitted to Traverse an Office, this admission of the party to the Traverse doth suppose the Title to be in him. *21 Car. B. r. Or else he had no cause of Traverse.*



If in an Action of Trespass and Ejectment, neither the Plaintiff nor the Defendant can make out a good Title, then the party that hath had the most ancient possession of the Lands in question, shall be judged to have the best Title. *Pasc. 23. Car. B. r. Mich. 1649. B. S.* For an ancient possession of Lands is a badge of a good Title to them, where a better Title doth not appear.

In an Action of Trespass brought for taking away of goods, the Plaintiff needs not set forth his Title to the goods. *Pasc. 23. Car. B. r.* For by the bringing of the Action, and by the Declaration it is supposed that they were in his possession, before the Defendant took them away from him, and that possession is Title enough to maintain the Action, and so he need not set forth any particular Title.

He that is made Ejector to try the Title of Land, is not bound to defend the Title of the Land, and therefore if he whose Title is truly concerned, will not save him harmless if the Tryal shall pass against him; he may confess a Judgment, and save himself of the trouble which otherwise may befall him by being made Ejector. *Mich. 1650. B. S.* But he must first acquaint him whose Title is concerned, that he will do it, and then if it be done, he hath no cause to complain.

*Tenement.*

A Tenement may be said to be any House, Land, or other such like thing which is any way held or possessed; and it is a word of a very large and ambiguous meaning, and therefore not fit to be used to denominate or express any thing which requires a particular description. *21 Car. B. r.*

*Tipstaff.*



*Tipstaff.*

The Court will not grant an Attachment against an Officer of the Court for a misdemeanor committed by him as an Officer of the Court ; but one of the Tipstaffs which are Officers of this Court, called by that name, by reason of a staff which they carry tipped with silver, is to bring him into the Court. 21 Car. B. r. *And they are in this regard in the nature of Messengers or Pursuivants of the Court.*

If a Sheriff do commit a misdemeanour in relation to the Court during his Office, and afterwards a new Sheriff is elected, whereby the old Sheriff is out of his Office ; the Court may grant a Tipstaff to the party injured, to bring him in to answer the misdemeanour; for being out of his office, the Court cannot fine him for his misdemeanour. *Pasc. 24. Car. B. r. For he is only fineable as an Officer of the Court.*

A Tipstaff is to be granted for one that is in London or Westminster, but if he be in the Country, an Attachment is to be granted, directed to the Sheriff of the County where the party lives, and not a Tipstaff. *Hill. 22. Car. B. r. & 23 Car. & Pasc. 1650. For the Tipstaffs are Officers to attend the Court, and are not therefore to be sent out of Town.*

A Tipstaff was granted to bring in one Cr. an Attorney of the Common Pleas, for refusing to file a Bail, according to his promise made to an Attorney of this Court. *Nota.*

*Treason.*

him  
Lan  
Car.  
injur  
publ

*Treason.*

An intention of Treason, if it can be proved by circumstances, is Treason in the eye of the Law. *Trin. 22. Car. B. r.* And it is so, to shew the odiousness and greatness of the offence of Treason, by punishing the very intentions of it, which are not punishable in other offences criminal.

*Time.*

Where the Law doth not imply a certain Time for the doing of a thing, nor is there any certain time agreed upon between the parties for the doing it; there the Law doth allow the party a convenient Time for the doing of it. *Mich. 22. Car. B. r.* To wit, such as shall be adjudged reasonable, for the doing of it without prejudice to him that is to do it.

In some cases, one hath time during his life, for the doing of a thing, if he be not hastened to do it by request of the party for whom it is to be done; but if in such case he be hastened by request, then he is bound to do it in convenient Time after such request made. *Hill. 22. Car. B. r.*

*Trespass.*

An Action of Trespass, *vi & armis*, doth lye for him that hath the possession of goods or of a house or Lands, if he be disturbed in his possession. *Mich. 22. Car. B. r.* For there disturbance besides the private injury done unto him thereby, is also a breach of the publick peace. If

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If goods be taken by the Sheriff in Execution, and the goods be rescued out of his hands, an Action of Trespafs lies against him that did rescue the goods. *Hill. 22. Car. B. r. viz. By the Sheriff, or by the party at whose suit they were taken ; and the party may be endicted for a rescous also, at the suit of the King for disturbing the peace and hindring the Execution of the Law, to the prejudice of his people and the Government established.*

One Action of Trespafs may be brought for a Trespafs committed in Lands which lye in several Towns or Vills. *Pasc. 23. Car. B. r. So that those Vills do lye in one and the same County, for else they cannot receive one Tryal, in respect they being local causes of action, the venue must come from the several Counties where the Trespaffes were done.*

An Action of Trespafs doth lye for a Parson against him that doth take away his Tithes after they are set forth. *Pasc. 23. Car. B. r. For after they are set forth, the Parson hath a property in Law in them, although the Parson never had an actual possession of them, but if they were never set forth, he cannot have an Action of Trespafs for them for the incertainty of them, but may bring his Action upon the Statute of 2 Edw. 3. to recover the treble value of them.*

If divers Actions of Trespafs be brought for one and the same cause, with an intent only to vex the Defendant, if the Court be moved in it, and proof thereof made by Affidavit, the Court will order the Plaintiff to joyn all his Actions into one, if it may be conveniently done. *Pasc. 23. Car. B. r. For the Judges of the Law do not favour unjust vexations of the people under a pretence of doing justice.*

## *the Accomplish'd Attorney.* 527

If one do carry another with force into the house of a third person, he who carries the other by force into the house, is the Trespassor unto the third person, and not he who is carried thither by force; and so if one do drive my Cattel into the ground of a third person, he that drives my Cattel into the ground, is the Trespassor, and not I, who am owner of the Cattel. *Mich. 23. Car. B. r. For one shall not be made a Trespassor against his will, and the person to whom the Trespass is done, is not without remedy.*

If a person or goods be rescued out of the hands of the Sheriff, which he hath taken in Execution by vertue of his Office, it is at the election of the Sheriff to bring an Action upon the Case, or an Action of Trespass *vi & armis*, against him that made the rescous. *Hill. 23. Car. B. r. For the Sheriff is answerable in Law to answer the goods taken in Execution; and it is therefore reasonable he should have an Action against him that rescued them, to recover the value of them.*

If one bring a meer Action upon the Case, he may declare omitting the words *vi & armis*, but if the Action be a bare Action of Trespass, there he must declare that the Trespass was committed *vi & armis*. *Mich. 24. Car. B. r. For an Action of Trespass doth imply a breach of the peace, and a capiatur is to be entered in the Judgment against the Trespassor for his fine to the King; but in an Action upon the Case it is otherwise, for there the Judgment is, that the Defendant shall pay such Damages as the Plaintiff is Damified by the taking of them, and be in misericordia.*

Trespases of several natures cannot be laid together in one Action. *Mich. 24. Car. B. r. Because they cannot be joyntly Tried.*

Upon

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Upon a recovery of Lands in an Action of Trespass and Ejectment, the Plaintiff may afterwards bring an Action of Trespass against the Defendant, for the mean profits of the Land. So it was held in the case between *Wilmot* and *Holden*. Trin. 1652. B. S. *The mean profits are such profits of the Land as did grow due betwixt the time of the bringing of the Action and the time of the recovery, but more he shall not recover; for if he be more damnified, it was his own fault that he brought his Action no sooner.*

An Action doth lye at the Common Law, for the person for taking away of Tithes after they are severed from the Land. Mich. 24. Car. B. r. *To wit, against the occupyer of the Land. Q. Tamen. For it seems before the Statute of 2 Ed. the sixth, the Parson had only remedy for his Tithes in the Spiritual Court.*

### *Tales.*

Upon a Tryal at the Bar, if the Jury do not appear full, the Court cannot grant a *Tales de circumstantibus*, but the Court upon a motion will grant a *Tales* returnable in some convenient time the same Term to try the cause. Mich. 22. Car. B. r. 1650. B. r. *For the Statute doth not extend to Tryals at the Bar, which did enable the making of a Tales. A Tales de circumstantibus, are so many persons which are returned to serve on Juries at the Assizes, to supply the places of those that did not appear upon particular Juries. See the Statute.*

A Corporation Court cannot grant a *Tales*. Pasch. 23. Car. B. r. *For the Statute doth not extend unto Corporations. See the Statute.*

A *Tales* is not to be granted where the whole

or Jury, is challenged for want of Hundreders, in such case the whole pannel, if the challenge be made good, is to be quashed, and a new Jury is to be returned. *Mich. 1650. B. S.* For a Tales consists but of some persons to supply the places of such of the Jurors as wanted of the number of twelve, and is not to take a new Jury. See the Statute.

If the Sheriff take Bail of one for his appearance who is notailable by Law, and return a *cepi corpus* thereupon, although the party do not appear, an action doth not lie against the Sheriff for a false return; but the Plaintiff must proceed against the Sheriff by way of amercements. *Mich. 1650. B. S. 26.* For in regard that the Sheriff ought not to have taken Bail, though he have taken it, yet it shall be accounted as if he had not taken Bail, and as if no return had been made thereupon. Q.

*Terms.*

The Issue Terms, are *Hillary Term* and *Trinity Term* only, the other two Terms are not so called, and the Issue Terms are so called, because in them are the Issues joyned and made up, which are to be tryed the Lent Assizes, and the Summer Assizes which do immediately and respectively follow them. *Hill. 22. Car. B. r.*

- |                       |   |
|-----------------------|---|
| 1. <i>Essoigne.</i>   | } <i>Hill. 22.</i><br>} <i>Car. B. r.</i> |
| 2. <i>Exception.</i>  |   |
| 3. <i>Appearance.</i> |   |
| 4. <i>Return.</i>     |   |

The four days in Term are the day of,

All the Term in construction of Law is accounted at one day, and therefore a Plea that is put in the first day of a Term, is a Plea of the first day of the



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*Term, & sic è contra*, as to some purposes. *Trin.* 23. *Car. B. r.* *Mich.* 1649. *B. S.*

The Term is said to begin upon the first *Essoigne* day, which is three days before the Courts of Justice do sit, and not at the first day of sitting of the Courts. *Trin.* 24. *Car. B. r.* *Because some businesses of that Term do begin at that time, and then one of the Judges doth sit in Court to take the Essoigns.*

The same day of the week that *Michaelmas* Term doth end, the same day *Hillary* Term doth always begin. By *Woodward* Clerk of the Court. *Hill.* 24. *Car. B. r.*

*Toft and Croft.*

A *Toft* is a place where an old house did formerly stand, and it also signifies a decayed house not inhabited. *Pasc.* 23. *Car. B. r.*

A *Croft* is a small piece or close of Land enclosed, that lies near a dwelling-house. *Pasc.* 23. *Car. B. r.*

*Trover and Conversion.*

*If the Trover is brought in one County, and the Conversion is in another County, the Action brought for these goods may be laid in the County where the Conversion was; for the Conversion of the goods is the chief cause of the Action.* *Pasc.* 23. *Car. B. r.* *For the Action is called a Trover and Conversion, and not a Trover only, and the Action is brought as well for the Defendants converting of the goods to his own use, as for the finding and detaining of them.*

Two causes of Action for a Trover and a Conversion cannot be joyned in one Action. *Trin.* 23. *Car. B. r.* *Because the causes of Action are for several goods.*

goods, and it may be the Trovers and Conversions were at several times and places.

An Action of Trover and Conversion may be brought for goods, although the goods for which the Action is brought, do come into the possession of the Plaintiff that brings the Action before the Action brought. *Pasc.* 1651. 22. *Ap. B. S.* For the coming of the goods into his possession before the bringing of the Action for them, doth not purge the wrong, or make satisfaction for that which was done to the Plaintiff, by the finding and detaining the goods, and so he hath still cause of Action, although his damages may not be very great, in regard he hath his goods again.

*Trust.*

The Chancery will compel one to perform a Trust which he hath taken upon him, except it be a Trust taken upon him for the benefit of an Alien. *Pasc.* 23. *Car. B. r.* For to compel that might (in many cases) prove prejudicial to the Common-wealth, and repugnant to the Common Law, which neither Law nor Equity might to compel.

The way of making Conveyances by way of Trust, was invented to evade the Statute of uses, *Pasc.* 23. *Car. B. r.* And is not so much favoured in Law as plain and direct Conveyances of Estates.

*Cestuy que trust*, cannot take the profits of the Land settled by the Trust, but hath only his remedy for them in equity, for the Estate in Law in the Land is only in the party that hath the Trust. *Trin.* 23. *Car. B. r.* And the Law takes no notice of the Trust, &c.

*Tenure.*

Lands which are granted by the King, to hold of him of his Mannor of East-Greenwich in Kent, in capite, is a Tenure in Socage, and the words in capite in the grant are void. *Trin. 23. Car. B. r.* For these words in capite are repugnant to the Tenure created by the Grant ; for all Lands that hold of that Mannor are held in Socage.

*Tender.*

A Tender of Rent to save the forfeiture of a Lease, ought to be a Tender of the whole Rent, due at the time of the Tender, without any deduction of Taxes or other payments. *Trin. 23. Car. B. r.* Because there was no notice taken of such deductions to be made at the time of the Covenant made ; for the Lessee covenants to pay the whole Rent.

*Tithes.*

The Rector of a Church shall be accounted the Proprietor of the Tithes of that Parish, to which the Church doth belong, if the contrary be not shewed. *Trin. 24. Car. B. r.* Because most Rectors are so, though some be not.

Tithes of Land which do not lie in any Parish, do properly belong to the King. *Mich. 24. Car. B. r.* For that which no Subject can justly claim, is the Kings as Lord Paramount.

Lands which lie in a Forest, and are in the hands of the King, are free from paying of Tithes, although they do lie within some Parish ; but if they be disforested, and come into the hands of another, they ought

ought by the Common Law to pay Tithes: for the not paying of Tithes for them, whilst they were in the Kings hands, and were Forest Lands, is but an immunity for the time, and not an absolute discharge. *Mich. 24. Car. B. r.*

Tithes are not due to be paid *Jure Divino*, but *per legem terræ*, so held by the Court, agreeing with *J. Seldons History of Tithes. Mich. 1649. B. S.*

If Lands paid no Tithes before the Statute of *Ed. 6.* or but very inconsiderable Tithes, and afterwards the Lands for which the Tithes were paid, are improved by the owner, he shall only pay the accustomed Tithes paid for them before the improvement of them, to wit, such Tithes as were paid for them for the seven last years immediately preceding the improvement; but if no Tithes at all were paid for them before the improvement, no Tithes shall be paid for them after the improvement. *1650. B. S.*  
*For the improvement of Land not titheable by Law, cannot make it titheable, for this were to alter the Law.*

*Venue and Venire Facias*

*See Rich. and Ast. Cor.  
B. r. 6 A. in 1649.  
See mag. no changing*

**I**n transitory actions the Plaintiff after the Escoigne day of the subsequent Term, after the appearance shall not alter his own Venue, though he would pay costs or give imparlance. *Per Magistrum Livesey, &c. P. 21. Car. 2. R.*

A *Venire Facias* ought to be *de aliquo vicineto*, that is, neighbourhood; and therefore if the Writ of *Venire* do say *Venire Facias homines burgi*, it is not a good *Venire*, for it ought to be *Venire Facias homines*

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*de burgo.* 21. Car. B. r. Q. Differentiam inter of and from. It seems homines burgi may be any persons whatsoever that live in a Borough or Corporation, and that homines de Burgo is meant such men only that are not only Inhabitants there, but are also members or free-men of the Borough or Corporation.

If a special Verdict be imperfect in matter of substance, there must be a new *Venire*, that there may be a new Verdict found, because the ill Verdict doth not give the Court power to judge of the matter in Law; and so it is also if a demurrer upon an evidence be not good. By Rolle. Mich. 22. Car. B. r. & Trin. 23. Car. B. r. Q. For if the demurrer be not well joyned, the matter in Law is question can never come in question.

Upon a day given upon a rule to shew cause why a new *Venire* should not be granted, it was moved that the *Venue* might also be changed, but denied; for by Glyn Chief Justice, this would be to make a new retort, and not to try the only issue, as the Court did intend. In the Case of *Studder* Plaintiff and *Elliston* Defendant in a Trover and Conversion. Hill. 1655. 23. Jan. B. S.

A *Venire Facias* that is filed, cannot be altered without the consent of the parties. Mich. 22 Car. B. r. For the filing of it doth make it a Record, to which the parties are bound to stand.

In an Action of Trespass and Ejectment, the *Venue* ought to be from the Vill or Hamlet, where the Lands in question do lie; and if the Lands lie in no Vill or Hamlet, the *Venue* ought to be *de corpore Comitatus*, that is, from the body of the County. Mich. 22. Car. B. r. For where a more particular place may not be found, a more general must serve the turns, rather

whether then the cause should not come to a tryal, and so be a failure of Justice.

The Judges may alter the *Venue* from the place whence by the Law it ought otherwise to be, if they believe there cannot be an indifferent tryal in the County where the *Venue* was first laid. *Mich. 22. Car. B. r.* By reason of the great power that one party hath in the County, or for some other cause; for the Judges are bound, as much as in them lies, to see that equal Justice be done betwixt all parties.

Where the *Venue* cannot be from a Vill, Hamlet, or *lieu conus*, there it may be *de corpore Comitatus*. *Mich. 22. Car. B. r.* For if it might not be so, the cause could not be tryed, and so there would be a failure of Justice, which the Law will not permit, if it may be helped without injustice.

A *lieu conus*, is a Castle, Mannor, or other notorious place well known, and generally taken notice of by those that dwell about it, and not a Close or Pasture ground, or such like place of no repute. *Mich. 22. Car. B. r.* Which may be known or not be known of those that inhabit near it.

In all cases where there is to be a special Jury, there the *Venire Facias* must be special. *Mich. 22. Car. B. r.* For ordinary forms are not applicable to extraordinary proceedings.

If the matter to be tryed be within divers places in one and the same County, the *Venire* shall be general; but if the matter be in divers Counties, there the *Venire* ought to be special. *Mich. 22. Car. B. r.* For the general form of a *Venire* doth not warrant to return a Jury in one cause out of divers Counties; but in such cases to prevent the failure of Justice, the Court hath power to vary from the old forms, and to direct such a special *Venire*.



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Where a certain place cannot be known whence the *Venue* should be, the *Venue* is to be *de corpore comitatibus*; and so it is where a custom of the County is to be tryed; for the custom runs through the whole County. *Hill. 22. Car. B. r.* And therefore may be indifferently tryed by Jurors returned from any part of the County.

A fault in a *Venire* is helped after a Verdict by the Statute of *Jeofails*; but where the *Venire* is wholly insufficient, it is not helped; for it is all one as if there were no *Venire*, the Statute extends not to such *Venires*. *Hill. 22. Car. B. r.* See the Statute.

After a Plea pleaded, and an issue joyned in the cause, the *Venue* cannot be altered, except the parties consent to it; for by the pleading and joyning in the issue, both parties did impliedly agree to the *Venue* as it was laid. *Hill. 22. Car. B. r. Pasch. 24. Car. B. r. Trin. 24. Car. B. r.*

If the *Venue* be laid in a foreign County, and the parties proceed to issue in the cause, the Court will not change the *Venue* afterwards, although the Defendant would try the issue afterwards by proviso. *Pasch. 23. Car. B. r.* For the tryal by proviso must be upon the old issue, and the pleadings are not to be altered.

Where the Verdict is imperfect, so that Judgment cannot be given upon it, there must be a new *Venire* to try the cause *de novo*. *Mich. 23. Car. B. r.* For the former tryal is to no purpose, because Judgment cannot be given upon it, and so the Plaintiff hath not the effect of his Suit.

If a matter in Law be depending undetermined, and an issue also joyned in the cause, there must be a special *Venire* awarded, *tam ad tryandum exitum quam*

*quam, &c. Hill. 23. Car. B. r. As well to try the issue, as to find the damages both upon the issue and upon the matter put in Judgment of the Court, if Judgment shall be given for the Plaintiff.*

It is not necessary to enter the *Venire Facias* before the Tryal, but the Plaintiffs Attorney ought to give a Copy of it unto the Defendants Attorney before the tryal, if he desire it; and after the tryal it may be entered. *Pasc. 24. Car. B. r. That the Defendant may consider of it, whether it be according to Law.*

A *Venire de vicineto Civitatis*, is good without naming of the Parish within the City, out of which the Jurors are summoned, and so was it said to be adjudged in *Gavell and Gippoes Case*, 10. *Jacob.* contrary to the Book of 5. *H. 5.* For a City may have but one Parish in it, and it is said it shall be intended to have no more Parishes then one, except the contrary be shewed.

The party that will move to have the *Venue* changed, he must move for it the same Term the Declaration is delivered, if it be delivered above eight days before the Term ends to the Defendants Attorney; but if there is not eight days of the Term to come when it is delivered, it may be moved the next Term after the Action is brought, before the Rules for Answer are out. *Trin. 23. Car. B. r. For that is the proper time to plead and joyn issue.*

This Court ought not to change the *Venue*, so that by it the cause cannot be tryed within the Jurisdiction of the Court. *Trin. 23. Car. B. r. For that is to oust themselves of their own jurisdiction, and it may be to the prejudice of the Plaintiff that laid his Action there.*

If the Defendant will move to change the *Venue*,  
he

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he must make oath that the cause of Action, if any be, did arise in the County where he would have the *Venne* laid, and not in the County where the Plaintiff hath laid his action ; and the Defendants Attorney or his Clerk must make oath when he received the Plaintiffs Declaration, that the Court may not be changed contrary to the rules before mentioned. *Trin. 23. Car. B. r.*

Where an Action is brought for a real thing which is called a real Action, the *Venne* ought to be laid in that County where the thing is for which the Action is brought. *Hill. 23. Car. B. r.* *Because it is local, and only tryable there, and is not transitory, which may be in any County.*

The Court will not change the *Venne* in an Action brought upon an obligation at the prayer of the Defendant. *Hill. 23. Car. B. r.* *Because the Action is personal and transitory, and it is at the election of the party to lay it where he pleaseth ; yet the rules of Court for the laying of personal and transitory Actions, have not been very constant of later times, but the Courts do vary as they see cause.*

A Judgment given in an inferior Court, was reversed here by a Writ of Error, because the *Venire* was *Venire Facias*, &c. and not at large. *Hill. 1650. B. S.* *But such a Venire in the Common Pleas is good : For the constant course there, is to enter the Venire briefly with an &c. but inferior Courts must not vary from their usual forms.*

The Defendant may move to alter the *Venne*, although the Plaintiffs Declaration be not perfect. *Mich. 1650. 25. Oct. B. S.* *For though it be not perfect in all things, yet it may be so perfect, that he understands where the Venue is laid, and that is enough*

ground a motion upon to alter it, if it be laid where  
ought not to be.

In an Action of Debt brought for Rent due for  
Land, the *Venue* may not be laid out of the County  
where the Land lies for which the Rent is due: for  
the Action is a local Action, *ratione terre*, out of  
which the Rent is issuing, and is not transitory. *Hill.*  
1650. B. S. 29. Jan. Q. For this is contrary to the  
practice and many Cases adjudged; for the Action is  
brought upon the Demise, which may as well be tryed  
where the Lease was sealed, as where the Land; for it is  
not necessary to deliver a Lease for Lands upon the  
ground.

A *Venue* cannot be laid in *Wales* in a transitory  
Action, the Cause whereof did arise in *England*; be-  
cause this would be to remove the Cause to be tryed  
out of the jurisdiction of the Court, and then this  
Court can give no Judgment in it. *Trin.* 23. Car. B. R.  
And so the Tryal would be fruitless.

The *Venue* cannot be changed after the Defendant  
hath pleaded, although the Plaintiff have amended  
his Declaration in a principal and material part of it,  
after the Defendant did put in his Plea, and though  
the Defendant do imparle by reason of that amend-  
ment, for all this makes it not a new Declaration.  
1650. B. S. And the Defendant hath taken advan-  
tage of the amendment by his imparlance to it, whereas  
otherwise he ought to have pleaded.

A *Venire* out of an inferior Court ought to run  
thus; *Ideo præceptum est per eandem Curiam.* *Hill.*  
1649. B. S. 30. Jan.

In the Case of one *Studder* and *Elliston* in a Tro-  
ver and Conversion, upon a rule formerly made to  
show cause why a *Venire de novo* should not be grant-  
ed,

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ed, and no cause shewed, it was moved that the *Venue* might be altered. But *Glyn* Chief Justice answered, it cannot be, for this would be to make a new Record but take a *Venire de novo*. *Hill. 1655. B. S.*

It is not necessary to insert the Names of the Jurors in the *Venire Facias*, although it was the ancient course to do it. *Q. Hill. 1649. B. S. 4. Feb. So that ancient forms may be altered upon good reason, else not.*

Where the Declaration is good, but the Plea is uncertain, and yet an Issue is joyned and tryed upon it, this is a mis-tryal ; for there can be no Judgment given upon it, for there was no good Issue joyned, because the Plea was uncertain : and therefore there must be a Repleader to bring the matter in question, and a new *Venire* to summon another Jury to try the Cause again. *Hill. 1649. B. S. 8. Feb.*

A *Venire Facias* is oftentimes returned before the Plea be entred, and yet it is well enough. *Pasc. 1650. B. S. 24. Maii.* For the Plea is a Plea before it is entred, so that there is an Issue to be tryed, which is a sufficient Warrant for awarding and returning of the *Venire* ; the Plea is the act of the Defendant, and the Entry of it is only the act of the Clerk.

A *Venue* is not to be changed in an Action of Debt brought for Rent, or upon an Obligation, or in an Action of Covenant, or in an Action of Accompt. *Trin. 1650. B. S. 26. Junii. Mich. 1650. B. S. 23. Nov. Because they are transitory Actions. Q.*

The *Venire* ought to be delivered to the Sheriff four days before the return of it, if the Jury do dwell forty miles off ; and eight days, if they dwell further off then forty miles from the place where the tryal is to be. *Pasc. 1651. B. S. 13. Maii. That he may have*



have convenient time to summon them, and they to appear after the summons.

If the Defendant do move to change the *Venue* upon Affidavit made, that the cause of Action, if any be, did arise either in *Kent* or *Surrey* (for example) and not in *London*, where the Action is laid, the Plaintiff shall have his election, to lay his Action either in *Kent* or in *Surrey*, upon giving the Defendant notice, in which of them he will lay it, but shall not lay it in *London*. 1651. B. S.

The Attorneys are sworn, not to lay personal Actions in foreign Counties, but in the Counties where the causes of them did arise; and the Statute doth also prohibit it; for the laying them in foreign Counties, doth put the people to charge for motions to alter the *Venues* into their proper Counties; and therefore it is fit the Attorneys should observe it. - By Rolle. 1650. B. S. But as yet the practice herein is unsettled and inconstant: And it may be it is not settled, because there might great inconveniencies grow by settling of it, and tying up the hands of the Court, from doing that which the exigency of the case may require in some special cases.

*Verdict.*

If there be several ejectors of several parcels of Land mentioned in a Lease of Ejectment, the Jury ought to find this matter especially. Hill. 21. Car. B. r. For they ought to find matters of fact as in right they are, and here is not one Ejectment, but divers.

A Verdict which is found against a Record, is a void Verdict. Hill. 21. Car. B. r. For a Record is of a higher nature, and more credit is to be given unto it than unto a Verdict, and the Record which proves it self,



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*self, doth prove that the Verdict is false.*

If a Verdict may be any ways construed, to make it a good Verdict, there ought not to be made a construction of it, to destroy it and make it void. *Hill. 21. Car. B. r. For the Law delights in the preservation of things, and to make the best construction of them, and would not have things to be done in vain, nor construe them to be so done, where a better construction may reasonably be made.*

The Court will not take a Verdict by default, except the Plaintiffs Counsel do pray it. *Hill. 21. Car. B. r. For the Plaintiff may chuse whether he will take the Verdict or no, and therefore the Court will not take it except he desire it.*

If the Plaintiff doth fail in proving of his Issue, the Verdict ought to be found for the Defendant; except the Jury do know of their own knowledge, that the Defendant is guilty. *Hill. 21. Car. B. r. So that the Jury is not so tyed up by the evidence, that they must always give their Verdict according to it: For a mans own knowledge is the best proof of things.*

If one of a Jury that found a Verdict, were outlawed at the time when the Verdict was found, the Verdict is not good, but may be reversed by error. *Hill. 21. Car. B. r. For an outlawed person is out of the protection of the Law, and is debarred from intermeddling with any Civil affairs, as a person excommunicated is from participating in Divine Ordinances, and is not bonus & legalis homo, as every Jury-man ought to be.*

If a Verdict be found for the Plaintiff, and he will not enter it, if the Defendant move the Court in it, they will compel him to enter it: and so it is where the Plaintiff doth refuse to enter a Verdict found

ound for him; upon the executing of a Writ of enquiry of Damages. *Mich. 22. Car. B. r.* For the Plaintiff ought to rest satisfied with what the Law gives him, or else there would be no end of Suits: Or the Defendant may enter it himself, if the Plaintiff will not, to prevent further trouble which may happen unto him by the not entring of it.

A Declaration that is not good, is in many cases helped after a Verdict, by the Statute of *Jeofailes*; but where the Declaration doth not make it appear that the Plaintiff had some cause of Action to warrant his Declaration, or where some material and essential part of the Declaration is omitted, such Declarations are not helped by the Statute. *Mich. 22. Car. B. r. & Hill. 22. Car. B. r.* For that were to supply a Declaration, where in effect there was none, which the Statute did not intend, but only to help small faults.

If a special Verdict be drawn up contrary to the notes agreed upon by the Council on both sides at the Tryal, the Court upon a motion will rectifie this, if the parties cannot agree between themselves to do it, or where the Council on both sides did formerly consent to such alteration, that makes it differ from the notes so agreed at the Tryal. *Mich. 22. Car. B. r.*

If the Court do direct the Jury to find a special Verdict upon the prayer of the Plaintiff or of the Defendant, the party at whose prayer the special Verdict was found, ought to prosecute this special Verdict, that the matter in Law in it may be determined. *Mich. 22. Car. B. r.* Because the Verdict was directed to be so found in his favour and at his desire; and therefore he ought not to make use of this favour to delay the other party thereby, but must prosecute with effect.

Where

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Where the Court doth direct the Jury to find a special Verdict, one of the Council on both parts are to agree upon the notes for it, and to draw them up, and to set their hands to them, and to deliver them in unto the Jury in convenient time, sitting the Court, or else the Court will take a general Verdict. *Mich. 22. Car. B. r. That the Tryal may take some effect, and not be fruitless.*

The Chief Justice at *Westminster-Hall* or *Guild-Hall*, or any Judge of Assize, may in some special case take a Verdict out of Court, which Verdict is called a privy Verdict, but then the Verdict must afterwards be pronounced in Court. *Mich. 22. Car. B. r. Q. How and upon what reasons.*

If a matter in fact be left out in the notes drawn up by the Council of the special Verdict found by the Jury, this cannot be amended afterwards, though the Court be moved in it, and although the Council on both sides do consent. *Mich. 22. Car. B. r. For this were for the Court and Council to make a new Verdict against the finding of the Jury, who have found the matter of Fact already as the notes are.*

If one of the parties whom a special Verdict doth concern, will not joyn with the other in prosecuting of the special Verdict, the Court upon a motion will order him to joyn in it; and if the Verdict be made up, and the party will not bring it in to be entred and proceeded in, the Court will grant an Attachment against the party. *Mich. 22. Car. B. r. For the Court is to speed the execution of Justice, and to hinder all matter of delay as much as may be.*

The Plaintiff and Defendant ought both of them to appear in Court to hear a special Verdict, and the Jury is to be called, and to have the special Verdict

read

read unto them by the Secondary, and upon the reading of it, if there be any mistake in the penning of it, the Councel on either side hath liberty to except against it, and when the Councel is agreed, then the Secondary demands of the Jury whether they agreed to find it so, and if they answer they do, then the Verdict is found. *Pasc. 23. Car. B. r. And it is to be entered according to the notes so found.*

If the Jury will find against the directions of the Court any thing in matter of Law, the Court will not receive the Verdict, but compel them to find as the Law requires. *Pasc. 23. B. r. For the Court is Judge of matters in Law, as the Jury is of matters of Fact, and they ought not to find against the Law.*

If in an Action upon the Case brought for speaking of scandalous words, the Jury do find that the Defendant did speak words which are Actionable against the Plaintiff, and so give a Verdict for the Plaintiff, and it appears that the words found are not expressed in the Declaration, this is not a good Verdict, if there be not other words found which are in the Declaration which are actionable. *Trin. 23. Car. B. r. For the words in the Declaration are only put in due to the Jury, to try whether they were spoken or not, and not the words which the Jury have found, and so they have found a Verdict upon no issue joyned.*

A special Verdict after the notes are agreed upon by the Councel, and drawn up, and their hands set unto them, is not a special Verdict, until it is allowed by the Court. *Mich. 23. Car. B. r. For they are to judge whether the matters in question be rightly stated or not.*

Where a Verdict is imperfectly found by the Jury, where the Defendant is not to move upon it in arrest

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of Judgment, for there cannot be any Judgment given upon such a Verdict, and by consequence the motion is needless ; but in such case there ought to be a new *Venire* to summon a new Jury to try the cause again, because the former Tryal was fruitless. *Mich. 23. Car. B. r.*

Where a special Verdict is imperfectly drawn up and entred, the Judges will not argue the matter in Law ; for there can be no Judgment given in the cause, by reason that the Verdict is not good, but in such a case there must be a new *Venire*, that a new Verdict may be found which may bring the matters in Law in question, that so they may be determined, and Judgment given according to the Law. *Hill. 23. Car. B. r. Mich. 1649. B. S. 13. Nov.*

A cause depending in Court upon matter in Law, found by a special Verdict, ought not by the ancient practice of the Court to be read in Court as a Record, until books thereof be given unto the Judges of the Court, and so is the use in the Exchequer at this day. *Pasc. 24. Car. B. r. That the Judges may have sufficient time to consider of, and to speak to the matter in Law, and to look into them at the time of the arguments made at the Bar, as they shall have occasion.*

Every misdemeanor of the Jury before they give their Verdict, is not a sufficient cause to make void the Verdict. *Pasc. 24. Car. B. r. Although they may be punishable for them.*

If a Verdict be given where there is no issue joyned, this is a *Jeofaile*, and there can be no Judgment given upon such a Verdict, but there must be a repleader to bring the matter to a Tryal. *Pasc. 24. Car. B. r. For there was nothing tryed before for want of an issue joyned.*

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*the Accomplish'd Attorney.* 547

A special Verdict ought to be prepared by Counsel, and delivered to the Jury to consider of before they deliver their Verdict in private to the Judge, and not the next morning when the Jury come to deliver their Verdict openly in Court. *Pasc. 1650. B. S.*

2. *Miii.* For then the Court cannot expect till they consider of it, and without consideration it is not fit for them to give their Verdict.

By *Glyn* Chief Justice. If the Court do order a special Verdict, and the Counsel do not attend with the notes of the Verdict, or do not set their hands to them when the Jury is to give in their privy Verdict to the Judge, the Jury may the next day give a general Verdict in Court notwithstanding the direction to find a special Verdict, and so was it done in a Tryal at the Bar. *Pasc. 1656. B. S.*

In criminal causes, if there be any errors in the proceedings, they are not helped after a Verdict, by the Statute of *Jeofailes*. *Pasc. 1651. B. S. 11. Miii.* For the Statute mentions not criminal matters, and it shall not be extended to equity, because it is in abridgement of the practice of the Common Law, and penal to the party concerned.

Although the Court do bid the Secondary Record non-suit, yet if it be not Recorded, the Court may take the Verdict afterwards. *Trin. 1651. B. S.* For the non-sute is no non-sute before it be Recorded, for it is not upon Record.

If the Plaintiff and the Defendant do consent to have the Jury find a special Verdict, the Jury ought not to refuse to find it. *Trin. 1652. B. S. Q.* For they may be satisfied, there is no cause for it.

A Verdict by default is found in this manner, in an action of Trespass and Ejectment. When the Jury



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is ready at the Bar to try the cause, the Secondary bids the Cryer call the Defendant, which he doth thrice; and if he do not appear, the Plaintiffs Council do pray the Court to take the enquest by default, thereupon the Jury is sworn, and the Record is read unto them, then the Plaintiffs Council do open the Record unto the Jury, and prove the Lease of Ejectment, and cause it to be read, and then open the Plaintiffs title; and if no evidence be given for the Defendant, the Jury find for the Plaintiff, and give him damages and costs of Sute. It is called a Verdict by default, by reason of the taking it in this manner upon the default of the Defendants appearance to defend his title. 1654. B. S.

In the Case of *Bateman and Harry. Pasc. 1659.* It was said by *Glyn* Chief Justice, that the Court will not compel the Defendants Council to subscribe a special Verdict; but if he refuse to do it, the Court will order the Verdict to be entred without subscribing of it.

If the Jury find a matter specially, and do conclude a thing which cannot stand and agree with their finding, the conclusion is idle, and shall be taken to signifie nothing. By *Rolle* Chief Justice. 1654. B. S. *For the Verdict was perfect without the conclusion, and therefore an idle and impertinent thing shall not vitiate that which was well found without such a conclusion.*

237, 5.

The Jury may find a matter of Record, if it be very ancient, or if the Record be imbezeled or cannot be found upon search made for it; notwithstanding what is held in *Scholasticas* case to the contrary, although the Record be not shewed to the Jury. By *Rolle* Chief Justice. But otherwise they cannot.

By Glyn Chief Justice. *Trin.* 1658. If an Action be brought for 500 l. the Jury may find part paid against the Plaintiff, and part unpaid against the Defendant, and so divide the Verdict.

In the Case of Sir *Job Harbey* upon a Tryal at the Bar, it was controverted whether if the Jury do find a Verdict contrary to the directions of the Court, whether it was a good Verdict or not, and whether the Court ought to take it; but at length the Court took the Verdict, though it was given against their direction.

*Valuation.*

A Jewel is not Valuable, but according to the Valuation of the owner of it, and is very uncertain. *Hill.* 21. *Car. B. r.* Q. Tamen. For it seems there is a certain Value for Pearls and Diamonds amongst the Merchant Jewellers, according to their weight, bigness, and lustre, although they may rise and fall in their prices, as other merchantable Commodities do according to the plenty or scarcity of them, and the high or low esteem they may be at in some times above others.

If one declare in an action of Trespas, for the taking away of live cattel, he ought to say that he took away his cattel *pretii* so much; but if he declare for taking away of things without life, he ought to say *ad valentiam* of so much. *Mich.* 1649. *B. S.* Q. *Differentiam inter pretium & valentiam*, or price and value. It seems to be, that live cattel are to be prized at such a price as the owner of them did in his account esteem them to be worth, which is uncertain; but dead things are to be reckoned at the value of the market, or as others would give for them, which may be certainly known.

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## Use.

A Use and a Trust were all one at the Common Law, and did both rest in privity, but are now distinguished by the Statute of 27 H. 8. *Which doth direct the operation of Uses, but leaves Trusts as they were.* Mich. 23. Car. B. r.

The limitation of a Use was at the Common Law but a matter in equity, and the party concerned was only relievable upon it in Chancery. *Mich. 22. Car. B. r. But since the Statute it is otherwise ; for now the Law takes notice of them.*

Feesimments to Uses, have the same acception as Deeds at the Common Law have, and are not to be interpreted as Wills are. *Mich. 23. Car. B. r. Which have a more equitable construction.*

It is all one whether a Use be raised by way of Covenant, or by way of Feesimment. *Mich. 24. Car. B. r. So that there be a good consideration for the raising of it ; for a thing may be well done divers ways in many cases.*

Privity of estate and confidence in the party, are the two great pillars by which Uses are supported. *Pass. 1650. B. S. 18. Maii. For without these they would soon fall to the ground and be useless.*

## Usury.

Where there is not a Usurious contract preceding, although he that lendeth money, do take more then eight pound *per annum, per centum*, upon a just comparing of the moneys received by him, whether it fall out by the miscatting of the parties, or by the mistake of

of the Scrivener, this is not Usury forbidden and punishable by the Statute. *Trin. 22. Car. B. r.* For the Statute was only made to prevent Usurious contracts which were binding in Law, and looked not at voluntary acts and mistakes.

Threescore pounds were reserved payable upon a Mortgage of Lands for three years, payable at every six months by equal portions, whereas the whole Use money for three years, for the moneys lent upon the Mortgage according to the Statute, came but in the whole to sixty pounds, and yet this adjudged to be no Usurious contract. *Mich. 23. Car. B. r.* For such Contracts are not within the letter of the Statutes made against Usury, and they are not to be extended to equity.

*Void and Voidable.*

A thing is Void which is done against Law at the very time of the doing of it, and such a thing done shall bind no person: but a thing which is only voidable, and not absolutely void, is a thing which he that did it, ought not to have done it, yet when it is done, he that did it cannot avoid it, but it may by some act in Law be made void by his Heir, &c. *21. Car. B. r.*

A Lease which is only Voidable, must be made Void by re-entry: but where a Lease is absolutely void, there needs no re-entry. *22. Car. B. r.* But if the Lessee will not avoid the possession, the Lessor may seal a Lease of Ejectment to try the title without any entry; but in the former case he cannot.

*Vill.*

The Constable of one Vill cannot execute his Office

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in another Vill. 24. Car. B. r. *For every Vill hath a particular Constable or Officer, and hath a confined power according to their several limits.*

There is an ancient Book called *Liber Villarum*, wherein is contained all the Vills and Parishes in England, viz. such as were at the time of the making of that Book ; but now I suppose there are many more then there was then. *Pasc. 24. Car. B. r. This Book, I take, it is in the Exchequer.*

### *Variance.*

If there appear to be a material Variance between the matter pleaded, and the manner of the pleading of it, this is not a good Plea. *Pasc. 24. Car. B. r. For the manner and matter of a pleading ought to agree in substance, else there will be no certainty in it.*

### *View.*

The Jury ought not to view the place in question betwixt the Plaintiff and the Defendant, without the direction of the Court, although the parties will consent. By Glyn Chief Justice. *Pasc. 1656. B. S. For the Court is to direct all the proceedings in Law in order to the Tryal, as being indifferent and best knowing to do that which is best for the expediting of Justice.*

The Court will grant, that the Jury shall view the thing in question for them to try, if they doubt of it, if the Plaintiff and Defendant will consent unto it, otherwise not. 15. Nov. Mich. 1650. B. S. *But the Jury must find, without a View, according to the light they have received from the evidence, as their consciences shall direct them. The granting of Views is*  
cause

*cause of delay, which the Court will be no cause of, except the parties freely consent to it.*

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*Warden of a Church, or Church-Warden.*

**A** Church-Warden is a Church-Warden, although he do not take an Oath, for the Oath was only enjoined him by the Bishop of the Diocese, by an usurped authority, and he is an Officer, whereof the Common Law takes notice, and was so before such an Oath was imposed upon him. *Mich. 22. Car. B. r.*

*Waste.*

If Waste be done upon Lands which are let for Term of years, or for life, by one against whom the Lessee can have no remedy in Law for committing this Waste, the Lessee is not punishable by the Lessor for this Waste, except there be a special covenant in the Lease, that he shall not commit or suffer Waste to be done. *Mich. 23. Car. B. r.* So that a special covenant of the party doth bind him, where by the Law he was not bound. A Foreign enemy that invades the Land, and makes destruction in Lands and Houses, is such an one as the Lessee can by Law have no remedy against for Waste done by him. *Q. Whether by such covenant he is punishable for such Waste.*

If Timber Trees be growing in the Hedges of a Field or Close lett for years, and the Lessee cuts them down, the Field shall not be forfeited in an Action of Waste brought against the Lessee; but if the Trees cut, did grow scatteringly throughout the Field or Close, the whole Field or Close is forfeited by cutting them



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them down. By German Justice. Pasc. 1650. B. S.  
17. Junii. Q. Tamen.

*Withernam.*

Cattel which are taken in Withernam, *ad valentiam*, that is, to the value of the Cattel that were first distrained, and so detained, that the Sheriff cannot execute the Replevin brought for them, is to be understood, not of the number of the Cattel first distrained, but according to their full worth and value. 1651. B. S. *For else he that brings the Replevin and Withernam will be deprived of his satisfaction he ought to have in case the distress were not lawfully taken.*

*Warranty.*

An Action doth not lye upon a bare affirmation, that the thing sold was worth so much, whereas in truth it was not worth so much as he affirmed, because it is every Shop-keepers case ; but if he warrants it, then *è contra*. *Lekins in Cliff. Pasc. 15. Car. 2. R. and Yelvertons Rep. to 20 Harvey against Young accor.*

If one Warranty a Horse, or any other thing sold after the time of the sale of it, such a Warranty is not good to bind the party that made the Warranty, but the Warranty must be made at the time of the sale, and then it is binding, because it is part of the contract ; but if it be made afterwards, it is but a discourse, and no part of the contract. Pasc. 1652. B. S.

*Writ,*

*Writ.*

A Writ may be either a Mandatory Writ, or it may be a remedial Writ; a Mandatory Writ, is a Writ which is directed unto the Cinque Ports, or to some other privileged place to enjoin them, not to exceed their jurisdiction; but this is not a remedial Writ to the party that obtains it, conducing any ways to his obtaining of right in his cause depending there. For such a Writ leaves them at large to do justice, and is rather cautionary then injunctive. *Trin. 22. Car. B. r. Though it may seem to imply something to that purpose.*

An Original Writ is not amendable, if it be erroneous in substance, because he that takes it out may have a new Original, and so is not without remedy. *Hill. 22. Car. B. r. Though the Writ be abated. But if a judicial Writ be erroneous, it must be amended, because the party cannot have a new Writ; and if it cannot be amended, the party is without remedy as to that way of proceeding he is in.*

An Original Writ which is defective in form only is abateable, if it be not amendable by the Statute, as in some cases it is, and in others not. *Hill. 22. Car. B. r. For Writs must be formal for preventing of confusion.*

If the Prerogative Court shall refuse to grant Administration according to the Testators Will, this Court may grant a Writ at the prayer of the party grieved to compel them to do it, and the Countess of Barkshires Case 29 Jac. and the Case of Saint Burien in Cornwall, were cited to prove it. *Hill. 22. Car. B. r. Such Writ is a mandatory Writ, and yet remedial;*

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*remedial ; so that a mandatory Writ may in some sort be remedial.*

If one bring a Writ of Ejectment, and pending the Suit, he makes an Entry into the Land for which the Action is brought, the Defendant may plead this Entry in abatement of his Writ. *Hill. 22. Car. B. r. For by the Entry he is supposed to have gained the possession, and so hath no cause of Action-suit.*

A Writ without a Teste is not good. *Hill. 22. Car. B. r. For the time may be material when the Writ was taken out, and it is proved by the Teste.*

Writs issuing out of any of the Courts at *Westminster* do not run, that is, are of no force within the County Palatine of *Chester*, or other County Palatine. *Hill. 22. Car. B. r. Because they have jura regalia within their jurisdictions, and are not subject unto other jurisdictions.*

The Sheriffs Bailiff cannot execute a Writ directed unto the Sheriff, without the Sheriffs Warrant. *Pasc. 23. Car. And if he do, he is liable to an Action for acting without authority.*

Where the Sheriff is Judge of the Court, a Writ which should otherwise have been directed unto him, shall be directed to the Serjeants of the Mace. *Pasc. 23. Car. B. r. That is, in such places where there are such Serjeants, who are the next Officers under him ; for the party cannot be Judge and Minister also in a Cause.*

After Judgment in a Cause, there can no Plea be pleaded in abatement of the Writ upon which the Action was commenced. *Pasc. 24. Car. B. r. For the Writ is allowed good by the pleading and proceeding to judgment.*

In a Writ of Dower, the Tenant cannot plead his  
petita

*petita* in abatement of the Writ of Dower. *Pasc. 24. Car. B. r.* That is, that the Defendant hath demanded her Dower by another former Writ depending, for she can recover but once. Q. Tamen.

In an Action of Debt, it is a good Plea in abatement of the Plaintiffs Writ, to say that the Plaintiff hath received part of the Debt, for which he sues, since his Action brought; but it is no good Plea in an Action upon the Case. *Pasc. 24. Car. B. r. Trin. 24. Car. B. r.* For in Debt the Plaintiff is to recover the whole Debt he declares for; but in an Action upon the Case, the Plaintiff is to recover no more then he can prove he is damnified by not paying of what he demands, and the money received since the Action brought, can but abate the damages, and doth not destroy his Writ; for it was incertain at the bringing of Writ how much he was damnified; but in Debt the certainty of the thing demanded did appear.

The Writ directed to call one to the dignity of a Serjeant at the Law, is a close Writ that is sealed up, to signifie it is his duty to keep close his Clyents cause and not to reveal it; but the Writ directed to one to call him to the place and dignity of Chief Justice or other Judge, is an open Writ, and not closed up, to shew that his duty is to do open Justice unto all. *Mich. 24. Car. B. r.* So said in a Speech made by one of the Commissioners of the broad Seal upon the calling of a new Judge to this Bench.

A Writ of Error brought by the Bail to reverse a Judgment given against the Principal only, is abatable; and so is it (by Rolle Chief Justice) where the Judgment was given against the Principal and the Bail also. *Mich. 1649.* Q. Tamen. In the latter Case; for the Bail may be prejudiced by such a Judgment. If

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If the party be sued to an Out-lawry upon an Original Writ, the Writ is determined by the Out-lawry, for it hath had its full effect, which was to make the party to come in and appear, and answer the Plaintiff, or else to Out-law the Defendant, if he should not appear. By Rolle Chief Justice. *Hill. 1650. B. S. Q. If the party come in upon the Out-lawry, and reverse it, if it be so.*

Where the Sheriffs Bond which he took for the Defendants appearance is put in Suit, the Writ taken out to arrest the Defendant upon this Bond, ought to be directed unto the Coroner, because the Bond is to be sued in the name of the Sheriff. *Pasc. 1650. B. S. 17. Ap. And so he is accounted (in Law) to be a Party, and is not to act for his own interest.*

### *Writ of Enquiry of Damages.*

The Court will quash a Writ of Enquiry of Damages, and not suffer it to be filed, if the Plaintiff do execute it without the giving of due notice of the execution thereof unto the Defendant, and put him to take out a new Writ of Enquiry. *Hill. 22. Car. B. r. Because the Defendant was surprised thereby, that he could not make his defence in mitigation of damages so fully as otherwise he might have done.*

If it do not appear to the Court by the Return, or by some other way, that a Writ of Enquiry hath been executed, the Court will grant the Plaintiff a new Writ (if he desire it) if the former Writ do take no effect. *Mich. 22. Car. B. r. For if it have not been executed, it is as if there had been no such Writ.*

A Writ of Enquiry is to issue forth where a Judgment is had in Trespass, Trespass upon the Case, Replevin,

plevin, &c. upon a *nihil dicit*, or *non sum informatus*, or upon a Demurrer, and not upon a Verdict; and this Writ is to summon a Jury to try what Damages the Plaintiff hath sustained by the Defendant in the cause, because the damages were not formerly assessed, the matter not being tryed by a Jury. *Hill. 22. Car. B. r. As they would have been by the Jury, if a Verdict had been found.*

If there be error in a Writ of Enquiry of damages, the Court upon the prayer of the party, will grant him a new Writ, but will not suffer the old Writ to be amended. *Pass. 23. Car. B. r.*

If a Writ of Error be brought in this Court to reverse a Judgment given in another Court, and the Judgment is affirmed in this Court, this Court may grant a Writ of Enquiry of damages, if it was such a Judgment whereupon a Writ of Enquiry did lye. *Trin. 24. Car. B. r. Viz. a Judgment upon a nihil dicit, or upon a non sum informatus, in Ejectment, Dower, &c.*

If upon the executing a Writ of Enquiry of Damages, the Sheriff do refuse to swear and examine some of the witnesses produced on either part, and yet doth execute the Writ; the Court will grant a new Writ to the party grieved, for the old Writ was not well executed. *1651. B. S. Because all the evidence offered was not heard, which ought to have been done on both sides, that things may more clearly appear to the Jury*

*Way and High-way.*

There are three Ways taken notice of, to wit, *Alta Via*, *Communis Via*, & *Via by prescription*, that is, a High-way, a Common Way, and a Way by prescription.



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ption. *Pasc. 24. Car. B. r. And these may be severally subdivided into a*

$$\left\{ \begin{array}{l} \text{Cart} \\ \text{Horse} \\ \text{Foot} \end{array} \right\} \text{Way.}$$

If a High-way lye within a Parish, the Parish is of common right bound to repair it, except it appear that it be to be repaired by some other person, either by reason of tenure, or by prescription. *Mich. 1650. B. S. 24. Oñ. In regard of the conveniency of doing it, and of the benefit they have of the Way, and use of it above others.*

If any person do enclose any part of a way or watte, adjoyning to a High-way, he thereby doth take upon him to keep the way adjoyning in repair, for thereby he claims particular interest in the soil. *1651. B. S. Else he could not enclose it. Q. Tamen.*

### *Wager of Law.*

The Defendant cannot Wage his Law in an Action which doth arise upon a realty ; for there the agreement between the party cannot be so private, but there will be something to prove it besides the suggestion of the party, but only where the Action is personal, and the Cause private. *Trin. 22. Car. B. r. And therefore if an Action be brought for the Arrerages of Rent, the Defendant cannot Wage his Law, for the Rent doth arise out of the Land, and Sounds in the realty, and it may appear the Defendant had the Land, and the Law will presume he was to pay rent for it.*

The manner of Waging of Law is this, He that is to wage his Law, stands at the end of the Bar towards the right hand of the Chief Justice, and the Secondary asks

asks him, whether he will wage his Law, if he answers that he will, the Judges admonish him to be well advised, and tell him the danger of taking a false Oath, and if notwithstanding he persist, then the Secondary speaks words to the effect following unto him, and he that waget his Law, doth repeat every sentence distinctly after him, *Hear ye this, ye Justices, that I W.S. do not owe to B.B. the sum of* (naming the sum in the Declaration) *nor any penny thereof in manner and form as B. B. hath declared against me, So God me help,* and then he kisseth the book. But before he takes the Oath, the Plaintiff is called by the Cryer thrice, and if he do not appear, then the Defendant goes quit without taking his oath; but if he appear, then he must take his oath, and then he is discharged without pleading, and the Plaintiff is barred for ever. *Mich. 22. Car. B. r. If the Plaintiff do not appear to hear the Defendant perform his Law, he is non-suit, and then he is not barred, but may bring a new Action. Pasc. 24. Car. B. r.*

The reason why wager of Law is suffered, is because the contract upon which the Action is brought being a private contract, and not to be proved, it may be intended that the discharge may be in private, and not to be proved otherwise then by the Oath of the party, whom the Law will not presume will take a false Oath. *Hill. 1649. B. S. 31. Jan. And his Oath shall rather be accepted to discharge himself, rather then to suffer him to be charged upon the mere allegation of the Plaintiff.*

The Defendant cannot pray to be admitted to wage Law instantler after imparlance, but besore he pray, and then the Plaintiff cannot be non-suit, if the Defendant perfect his Law; but if he wage his

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*Lato* after imparlance, the Plaintiff may be non-suit Per Magistrum Livesey & al.&c. P.21 Car.2. R.

If one bring an Action of Debt upon a *concessit solvere*, as it is used to be done in Bristol and some other places, the Defendant may wage his Law. *Hill. 1650. B. S. 5. Feb.* For his confession is no proof of the Debt at the Common Law, though by a special custom an Action may be brought upon such a promise.

If the Defendant do tender his Law in Court, and is ready to perform it, and the Plaintiff being called, doth not appear, he shall be non-sute, and pay costs, but then he may bring another action for the Debt, if he please; but if the Plaintiff do appear, and the Defendant do make his Law, then the Plaintiff shall never bring another Action for that Debt, but shall be barred for ever. *Mich. 1650. B. S. 22. Nov.* For it is as much as if a Verdict passed against him, for here is all done that the Law requires towards the discharging of the Defendant.

### *Words.*

A Latine word used in pleading, which word doth signifie divers things, is nevertheless well used to expresse that thing which is intended to be expressed by it, if there be an *Anglice* joyned with it. *Hill. 21. Car. B. r.* For by the word *Anglice* it is explained what the party doth intend it shall signifie in English.

Words which may be taken or interpreted in a general and common sense, ought not to receive a strained and unusual construction. *Hill. 21. Car. B. r.* For it is likely the party that used them, had a plain and common meaning in them, and not a strained and unusual, and therefore the Law will take them according to common parlance.

Words which are in themselves uncertain, may nevertheless be made certain by subsequent or following words. *Mich. 23. Car. B. r. Which may serve as a comment to explain what the speaker did mean by them.*

Although Words were not Actionable in themselves at the time of the speaking of them, yet if an Action be brought for the speaking of them, they may be made Actionable by the Defendants pleading by justifying of the words. *Mich. 22. Car. B. r. For it may be that in such his justification, he may explain in what sense he spake them, which did not appear plainly before; and where words are ambiguous, the best sense shall be taken generally.*

These Words, you are a Knave, spoken generally, will not bear an Action; but if one call another Knave, and apply the words particularly to the profession of him against whom they are spoken, as to call an Attorney at Law Knave, and to apply it specially to him in relation to his practice as an Attorney, an Action upon the Case will lye for speaking of them. *Hill. 22. Car. B. r. For by the application of them, they import a special damage done to the party by the speaking of them, in slandering him in his profession, and lessening of his practice.*

A word which is written short or abbreviated without a dash, is not good. *Hill. 22. Car. B. r. For the dash or turning up of a stroke or dash with a pen at the end of it, is the general mark or sign to distinguish an abbreviated word from a word written at length.*

Incertain words in the Count or Declaration, may be made good and certain by a Plea in Bar. *Hill. 22. Car. B. r. To wit, by the Defendants taking notice of the meaning of them in his Plea; for if they be certain*

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*to the Defendant, they are certain enough.*

The different placing of the same words may cause them to have a different sense or construction. *Pasc. 23. Car. B. r. And therefore care is to be taken in pleading, how the words used are placed.*

The Court ought so to order the words of a Will, that they may receive such a construction that may agree with Law, although by their mis-placing, they cannot in themselves receive such a construction. *Pasc. 23. Car. B. r. Ut res magis valeat quam pereat.*

Words in a Will, as they may be diversly penned, may either destroy a condition precedent, or create a condition subsequent where there was none before. *Pasc. 23. Car. B. r.*

Morage of a Ship, is when the Ship lies on the ground in the More, Mire, or Mud within a Haven or Harbor, and doth not float upon the water. *Pasc. 23. Car. B. r. Q.*

The Ansty of the City of York, is that part of the County of the City which extends without the City, and is an Hundred, which is within the jurisdiction of the City, and was added to it by Act of Parliament. *Pasc. 23. Car. B. r. Vide the Statute.*

The word *relaxavit* doth not amount to a surrender in the case of a common person, much less in the case of the King. *Trin. 23. Car. B. r. The verb relaxare whereof the word relaxavit is the preterperfect tense, signifies only to release, which differs much from a surrender, as appears by Littleton in his Tenures.*

The word interest for borrowing of money, shall be intended eight pounds a year per centum, if the contrary be not shewed. *Trin. 23. Car. B. r. This was when money was at eight in the hundred; but now*



*it shall be intended six pound in the hundred, according to the late Statute.*

The words of a Statute ought not to be so interpreted, that thereby natural Justice will be destroyed. *Hill. 23. Car.* For it is not the intent of any particular Law of a Land or Nation, to destroy the general universal Law of Nature; and therefore such a construction cannot be but contrary to the intent of the Law-makers.

The word *Simul* is not a word copulative, when it is joyned with the word *Et.* *Trin. 24. Car. B. r.* But *Simul cum* are words copulative.

Where there is a Latine word in a Declaration, which is falsely Englished, the English word shall be adjudged void, and the Latine word shall stand. *Pasc. 24. Car. B. r.* Q. Tamen. For the party that doth interpret it, knows best what he meant by it, and all words are but to express the mind of him that speaks them.

Where senseless words which signifie nothing are used in a Declaration to express things, they shall be accounted void and idle, and shall not hurt the Declaration, if it be good without them; for no damages shall be intended to be given by a Jury for those things which were intended to be expressed by those senseless words, and are not expressed, by reason of the senselessness of them. *Pasc. 24. Car. B. r.*

The word *videlicet* is used to explain the foregoing words in the Deed, or other writing where it is used; and if the words which the *videlicet* doth usher in, be contrary to the preceding words, they are void. *Pasc. 24. Car. B. r.* For then they cease to be an interpreter, and become destructive, contrary to their nature.



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One may upon a consideration dissolve by Paroll, an absolute contract. *Pasc. 24. Car. B. r. Viz. made by Paroll.*

One may give authority by Paroll unto another to take Livery and Seisin for him. *Mich. 1650. B. S. For he is but an instrument or Conduit-pipe to derive the possession of the Land to another : and it is all one as if he took the Livery and Seisin himself.*

Words ambiguous ought to receive such a construction as may make them stand with Law and equity. *Mich. 1650. B. S. And not to be wrested to do wrong.*

A mark made in the manner following, viz. A which is to shew where a clause or word left out and interlined in writing should come in, is called a *tra*. By *Rolle* Chief Justice. It seems to be derived from the Latine word *trahere* to draw, because by it the words left out are signified to be there where it is placed to be drawn into the writing. *1650. B. S. It may be also called a direct from the Latine word dirigere.*

*Witness. vid. 504*

In the Case of *Jones* against *Price*. *Trin. 1657.* It was said by *Glyn* Chief Justice, that although one be Bail to an Action, yet he may be a witness upon the Tryal of that Action. *2. Tamen.* For it seems he may be concerned in the Tryal. *1650. D. 1. 1. 1.*

A Witness who by reason of sickness, extreme age, or other cause cannot come to a Tryal, may by order of Court be examined in the Country by a Commission out of the *Chancery*, or before any Judge of the Court where the cause depends, and the testimony so taken, shall be allowed to be given in evidence at the

the Tryal. *Mich. 22. Car. B. r. This is admitted, that Tryals may not be hindred for lack of Witnesses.*

If a Witness be served with the Process of this Court to give his testimony at a Tryal, and will not come, the Court may grant an Attatchment against him for his contempt to the Court, and the party may have his Action upon the Case, to recover the damages he received for want of his Testimony. *Mich.*

*22. Car. B. r. Q. Whether he may be proceeded against both ways, because it is but one offence.*

The Testimony of one single person, is a sufficient Testimony for the King in a cause wherein he is concerned. *Mich. 22. Car. B. r. To wit, in criminal causes; but Q. Whether it be so in civil causes.*

A Witness that is to testify on the behalf of the King against one that is arraigned for Felony, may not be sworn against the King to give his testimony, but the prisoner may examine him, and desire his testimony without giving him his oath. *Mich. 22. Car. B. r. This is admitted in favour of life.*

If divers persons be made parties to a Suit, and some of them are either found not guilty, or else the Plaintiff will give no evidence against them, they may be allowed to be examined as Witnesses in the cause whereunto they were made parties. *Mich. 22. Car. B. r. For now it appears, they are not concerned in the Suit, but are as strangers and indifferent persons, and that the Plaintiff had no just cause of Action against them, but it may be, made them parties to take away their testimony.*

He that will make use of Witnesses at a Tryal, must get them thither at his own peril, and he shall not delay the other party for lack of his Witnesses. *Pasc.*

*23. Car. B. r. For he hath his remedy against his Wit-*

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*nesses, if he suffer in his Tryal by reason of their absence, by bringing an Action of the Case against them for not appearing.*

One that hath but a small Legacy given unto him by a Will, may be allowed as a Witness to prove that Will; but he that hath Lands given unto him by a Will, may not be allowed for a Witness to prove that Will. *Pasc. 23. Car. B. r.* For that were to suffer one to swear his own title, but in the former Case the Law will not intend that any one will forswear himself for a small matter. *467 370.*

It is not requisite for Witnesses to a Will, to set their hands unto it. *Pasc. 23. Car. B. r.* Nor for Witnesses to a Deed to do it; but it is very prudential to do it, the better to keep things in memory. For if they depose that they saw the Deed executed, or the Will published, it is sufficient proof, though their hands be not subscribed.

A man may be a credible Witness that is one of good fame and credit, and yet by Rules of the Law, he may not be a Witness in the Cause, wherein he is produced to give his testimony. *Pasc. 23. Car. B. r.* For he may be for some by respect not indifferent in that particular cause, though otherwise accounted of good credit and repute.

One that is made Executor of a Will, is not to be allowed as a Witness to prove that Will. *Pasc. 23. Car. B. r.* For his own interest may be concerned in the proof of the Will, in respect of the surplusage of the Testators estate which the Law casts upon him after the Debts and Legacies of the Testators be paid, if there be any such surplusage.

If the Council on both sides at a Tryal cannot agree what testimony a Witness examined in the Cause

Cause did give, the Court will examine him again. *Pasc. 23. Car. B. r.* That all things given in evidence may be left clear and without dispute unto the Jury to consider of.

Inhabitants within a Corporation, if they be not free of the Corporation, may be admitted as Witnesses for the Corporation, at a Tryal which concerns the Corporation. *Pasc. 23. Car. B. r.* For their interest is no way concerned, and favour is not a good exception against a Witness, although it be against a Juror, because the testimony of a Witness is left to the Jury to credit or not to credit as they shall find cause, and so it is not binding to the Jury, but the Jury's Verdict, be it true or false, is binding to the party, and therefore there is greater caution to be used, that they may be indifferent, and not partial.

A Witness may not be compelled to answer upon a *voir dire* touching a Trespass done, for the doing whereof he may himself be liable to an Action. *Mich. 23. Car. B. r.* For *nemo tenetur prodere seipsum*; for it is against the very Law of Nature, and therefore it seems the tendering of the Oath *ex officio* is not warrantable, which Oath is prohibited by Stat. 17. Car. to be administered.

One that is of Council in the Cause on one side, may be examined as a Witness in it on the other side, if he be served with Process to give his testimony therein, but otherwise he may refuse to be examined. *Mich. 23. Car. B. r.* For in the former case he is enjoined by Law to do it, which is to be preferred before his Client, but otherwise it is a voluntary act, and it is not civil for him to do it, nor is he to be pressed unto it.

The Examinations of Witnesses which were taken

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*ken in perpetuam rei memoriam*, ought not to be made use of at a Tryal, until the Witnesses so examined be dead. *Hill. 23. Car. B. r. Pasc. 24. Car. B. r. 19. Ap.* For they were only examined for their testimonies to be preserved, and to be made use of only in case they should dye before the Tryal.

One that is any ways concerned in the same Title of the Land in question, may not be allowed as a Witness in the cause, although he be no ways then a party to the Suit. *Pasc. 24. Car. B. r.* For his testimony tends to the corroboration of his own Title, and therefore shall not be presumed to be indifferent.

One that claims any benefit by a Deed, may not be allowed as a Witness to prove the Deed. *Mich. 1649. B. r.* In regard of his interest.

One that is to be a Witness at a Tryal, ought not to be examined before the Tryal, but by consent of both parties. *Hill. 1649. B. S.* And in such cases where he cannot conveniently be had at the Tryal.

The Court will upon a motion grant a *Habeas Corpus* to have a prisoner in prison upon an Execution in the Marshalsea, to be at a Tryal to be examined as a Witness, if the Tryal be in London; but he that obtains the *Habeas Corpus* must carry him thither, and bring him back at his own charge and peril, that he make no escape. *Trin. 1650. B. S. 29. Jun. Q.* Tamen, Whether it ought to be done where the prisoner is in Execution, in which case the prisoner ought to be in *arcta custodia* at the Suit of the party.

If a Witness be sick, so that he cannot be at a tryal, and it is so proved by Affidavit, and that Witness hath been formerly examined upon interrogatories in the Chancery in that matter upon which he is to be examined



examined upon at the Tryal, the intergatory may be admitted to be read in evidence to the Jury at the Tryal. 1652. B. S. *That the party may not have cause to complain that he wanted his evidence.*

One that hath been burnt in the hand for a Felony committed by him, and be pardoned for the Felony, may be admitted as a Witness in a cause. By Rolle Chief Justice. 1652. B. S. *For by the pardon his offence is pardoned, and he is made rectus in curia; for the pardon doth pardon as well the offence it self as the guilt of it.*

In the Case of one *Williams* and *Pues.* Pasc. 1656. B. S. Upon a motion it was said by *Glyn* Chief Justice, that one whom the Plaintiff makes a Defendant in the Suit, on purpose to take away his testimony, may be examined as a Witness in that cause *de bene esse*; and if the Plaintiff do prove no cause of Action against him, his testimony is to be allowed for good evidence in the cause.

Upon evidence given at a Tryal at the Bar between *Warren* a common Carrier and the Hundred of *Broad-water*, upon the Statute of *Winchester*, of Hue and Cry, it was said by *Glyn* Chief Justice, that a Carrier who is robbed, may be examined as a Witness at a Tryal touching that robbery, to prove the robbery, and what he was robbed of, otherwise the truth cannot be known. But he said, that this is the only case where one may be admitted to give his testimony as a Witness in a matter which concerns himself; and in this case the Carrier was examined accordingly. Nota. Mich. 1656. B. S.

In the Case of *Meridith* against the Hundred of *Warlington* in *Surrey.* Pasc. 1657. It was said by *Glyn* Chief Justice, that a Parishioner is not a competent



tent Witnesses to prove the Bounds of a Parish where he is an Inhabitant, although he pay neither Scot nor Lot, but receives Alms of the Parish, because he is subject to watch and ward, and so is concerned something, though not so much as others of greater abilities.

*Will.*

A *Codicil* may be added by *Paroll* unto a Will in writing, and this *Paroll Codicil* shall be put in writing, and affixed to the Will, as a *Codicil*: This may as well be done as a Will in writing may be revoked by *Paroll*, as it may well be. *Hill. 22. Car. B. r. Pasc. 23. Car. B. r.* And this *Codicil* is a Will in writing sufficient to bequeath Lands according to the Statute of Wills.

A Will which doth only concern the bequeathing of Lands, &c. ought to be proved in the *Chancery*; but if it be a mixt Will, and doth concern Lands, Goods, and Chattels also, it may be proved in the spiritual Court. *Hill. 22. Car. B. r. Q. Whether the practice be so now.*

The probate of a Will *per testes* is no corroboration of the Will. *Hill. 22. Car. B. r.* Although the common opinion is otherwise; for if it come in question at the Law, whether a Will or no Will, it is no evidence to a Jury to prove it a Will, because it was proved *per testes*; but the Will rests as much upon proof as if it had been proved in common form, for the Law takes no notice of Witnesses examined in the spiritual Court.

A Will in writing is a good Will to convey Lands, although the Will be not sealed. *Pasc. 23. Car. B. r.* For the Statute of 32 H. 8. that enables to convey Lands by Will, speaks nothing of sealing, but only of writing

*writing such Wills, and the Will declares the mind of the Testator, as well by the writing, as if it were sealed.*

If the Testator make his Will by Paroll, and do give direction to put his words in writing, which is *good also* done in his life time accordingly; this is a good *not so.* Will to convey Lands, although he do not afterward *19m. 2. 38.* declare that writing to be his Will during his life; but if his words were not put in writing till after his death, it is not a good Will within the Statute to convey Lands. *Asc. 24. Car. B.* For it was not his Will in writing, during his life, as it must be to convey Lands. But in the former Case it was because the words were written in his life time.

If the Testator do make his Will by Paroll, which is afterwards put by another in writing by his direction, and there is more expressed in the writing, then the Testator did express by Paroll, yet the Will in writing is good, as to so much of it as can be proved was expressed by Paroll. *Asc. 24. Car. B. r.* For so much of it was the Testators Will, and what is expressed more, shall be only void, and shall not vitiate the rest.

If a Will be made by Paroll, and it is afterwards put in writing, and the writing is embezeled, lost, or destroyed; yet is not the Will thereby destroyed, if it can be proved by Witnesses. *Asc. 24. B. r.* For the Paper is not the mind or will of the Testator, but only a Declaration and Manifestation what his mind and will was; and if that can be made appear any other ways, it sufficeth to prove be made such a Will.

A Will by which Lands are conveyed, ought not to be kept in the Prerogative Office, for it doth properly belong to the Legatee of the Lands to support his

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his Title at the Common Law by, if he be questioned for the Lands, and is part of his evidence, and therefore it is reason he should have the custody of it. *Mich. 1649. But they may take a Copy of it, and enter it into their Leiger Book, as they use to do.*

The Testator may, if he be at that time of  *sane memory*, desire another person to set his hand and seal to his Will for him ; and if he do it, the Will is a good Will, though the Testator did it not himself. *Pasc. 1650. Miii 5. For it would have been good, though no hand and seal had at all been set to it.*

It one make his Will in his sickness by the opportunity of his wife, to the intent he may be at quiet, and not vexed and troubled by her ; such a Will shall be adjudged to be made by constraint, and is not a good Will. By Rolle Chief Justice, in the Case of one *Hacher* and *Newborne* tryed at the Bar. *Mich. 1654. B. r. Q. Tamen. For Voluntas non potest cogi, and it differs from the Cases of making of a Deed by Menace or Duress, as me seems.*

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